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THE LAW
OF
ELECTRIC WIRES
IN
STREETS AND HIGHWAYS

BY
EDWARD QUINTON KEASBEY
OF THE NEW JERSEY BAR

SECOND EDITION
REVISED AND ENLARGED

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STATE JOURNAL PRINTING COMPANY,
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TO THE
MEMORY OF MY FATHER,
ANTHONY Q. KEASBEY,
IN GRATITUDE FOR THE INSPIRATION
OF HIS EXAMPLE AS A LAWYER AND AS A MAN,
THIS BOOK IS DEDICATED.

734094

PREFACE TO THE SECOND EDITION.

The use of the streets for lines of electric wires has increased very much since the first edition of this book was written. Many of the questions then discussed as new have now been definitely settled by the general agreement of judicial opinion, and different questions have since become the subject of controversy. The rights of the owners of abutting land have been considered in many later cases; but, except with regard to the use of streets for telegraph and telephone wires, there is now little difference of judicial opinion upon this subject. The questions that have become of greater practical importance are those relating to the powers of municipalities over the use of the streets for electric wires; the power of condemnation where private rights are involved; the interference of one kind of line with another; the liability for injuries arising from negligent construction or the use of dangerous currents, and the power of the states to impose license fees and franchise taxes.

Although some of the questions discussed at some length in the first edition have been settled by subsequent decisions following the tendency that was then pointed out, it has seemed best to retain what was then written and to add to it a brief account of the later cases so as to present the whole course of judicial decision upon the subject. The chapters on the questions of the authority to grant franchises and the nature and extent of municipal control of the use of the streets for electric wires have been wholly rewritten, and new chapters have been added on condemnation of private rights, on the liability for injuries

from the unauthorized obstruction of the highway, and from negligence in the construction or maintenance of the lines, and on the questions whether electric lines are real or personal property, whether they are subject to mechanics' liens, and to what extent they are subject to taxation, either as property or by reason of the franchises.

The scope of the book is indicated in the title. It deals with electric wires in their relations to the highways, and there has been no attempt to discuss the principles applicable to every kind of case in which electrical appliances are concerned. These are better considered under the law of torts or contracts, or any branch of the law to which they may relate. The purpose has been to study the cases relating to the use of the streets and highways for the electric railway, telegraph and electric light lines and other lines of electric wires.

EDWARD Q. KEASBEY.

NEWARK, NEW JERSEY, March 15, 1900.

PREFACE TO THE FIRST EDITION.

It is always interesting to observe the manner in which the courts deal with new inventions and apply old principles of law to new conditions. Invention within a few years past has been especially directed to new applications of electricity, and, in order to serve the new uses that have been found for it, streets and highways have been taken as convenient lines for the distribution of the electric current. The use of the streets for this purpose has given rise to some legal controversies, and it seems desirable that the decisions on the subject should be collected and examined in order to see how the principles of the law relating to the streets have been applied to these new uses.

The poles and wires for the electric railway have attracted especial attention to the subject within the last two or three years, and it was a discussion of these in an article I wrote for the *Harvard Law Review* for January, 1891, that suggested a more careful examination of the law relating to the use of the streets and roads of all kinds for electric wires, whether overhead or underground.

EDWARD Q. KEASBEY.

NEWARK, NEW JERSEY, June 1, 1892.

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ELECTRIC WIRES

IN

STREETS AND HIGHWAYS.

CHAPTER I.

INTRODUCTORY.

§ 1. **Growing importance of the subject.**—When it was found that messages could be sent by means of electric wires instead of the post-horse or the railroad car, turnpikes and railroads were naturally chosen as convenient places for stretching the lines of telegraph wires from town to town and city streets were used for the same purpose. Permission was given by statute to use the public rights in the highway. Little, if any, damage was done to the land along the line, and the owners did not think it worth while to ask the courts whether their legal rights were invaded. Scott and Jarnagin in their work on telegraphs, written in 1868, refer to the question as a matter of speculative rather than of practical interest and cite no cases in which it is discussed.

Within a few years past, however, the uses of electric wires in streets and highways of every kind have been greatly multiplied. It has been found that the wires will carry the sound of the voice and send spoken as well as written messages; that they will furnish light for the streets and buildings, and will transmit power for turning machinery or for moving vehicles. For all these uses the electric current must be distributed from central sources and carried by wires throughout the city and across the country. The lines of wire, therefore, have greatly increased in number. They occupy the streets of the cities and are stretched along all the chief highways of the country. Always more or less objectionable to owners of property, they have become especially obnoxious by reason of the increasing

numbers of poles and wires. The poles disfigure the appearance and to some extent obstruct the use of the streets. The wires affect the access of firemen to buildings in case of fire. Some of them carry currents dangerous and even deadly to the travelers in the streets, and when there are wires of different kinds for various purposes, one current is found to interfere with the free use of another. For all these reasons there has been opposition to the use of electric wires in streets and highways, and the contest has led to litigation. The wires, however, are too useful to be dispensed with; the purposes they subserve are public purposes, and the conveniences they furnish are enjoyed by many. The use of them is likely to increase rather than diminish. Their purposes, if not the same as those of the highway itself, are closely allied to them, and it is only by using the highways that they can fully serve their purposes. Their relations, therefore, to the public and private rights in the highways must be defined, conflicting rights must be adjusted, and the manner of using the streets must be controlled.

The questions involved depend, of course, upon the principles governing the use of streets and highways and the powers and duties of municipal corporations, and have been considered in the text-books upon these subjects; but in view of the recent decisions relating especially to the use of electric wires and of the increasing importance of the subject, it may be well to consider these uses of the streets by themselves.

§ 2. The legal relations of the wires to the highways.—The legal relation of these lines of wire to the streets and highways depends to a great extent upon the question whether such use serves the purposes for which streets and roads are opened, and also upon the question whether they interfere with the uses to which the streets have been commonly put.

The rights in the streets are both public and private. The streets are opened for public use, but only for use as streets. The title to the land, subject to this use, remains in the owners, or else the title is held by the public for this use alone, and the owners of adjoining lands have a right to take part in this use in connection with their lands, and to insist upon having the road used only for the public purposes to which it was devoted.

The discussion, therefore, involves the consideration of what are the proper uses of the street, and how far these are subserved by the various uses of electric wires, and also what are the public or private rights with respect to the streets and to the use of them for these purposes.

With respect to the public, the first question is whether any special authority is required for making such use of the streets, and, if so, whence the permission is derived and how it may be obtained. Then, supposing the lines to be put up under lawful authority, there will remain questions with regard to the regulations under which the privileges may be exercised and the liability for interfering with the other uses of the highway.

With respect to private rights the subject involves the discussion of the rights of the owners of adjoining land in the streets, both their rights of access and passage, and their title to the land itself and also the liability for injuries received by individuals in consequence of unlawful obstruction of the streets, or by reason of negligence in the construction and use of these lines of wires for the transmission of electricity.

Other questions affecting private rights are those involved in the controversies between persons or companies using the same streets for parallel lines of wire for different applications of electrical energy, and between persons or companies using electric wires and those having special rights or privileges in the same highway, as, for instance, a railroad or a turnpike company.

§ 3. Arrangement and division of the subject.—The discussion, therefore, may be arranged and divided in general terms somewhat as follows:

1. PUBLIC RIGHTS.—*The authority by and under which the streets and highways may be used for poles and wires.*

Under this the questions arising will be such as these:

Are the public rights in the streets vested in the municipal governments or in the legislature? If the power to permit a new use of the streets must come from the legislature, is it included in the ordinary powers delegated to municipal corporations, and, in particular, are the telegraph and the telephone, electric light and power and the electric railway, uses for which cities and towns may grant the privilege of stringing

wires or laying cables in the public streets? And again, if the power to use the streets be given by the legislature subject to municipal consent, what conditions may be imposed by the city and what regulations may be made with respect to the use of the franchise? Under this will come questions as to the power to impose license fees or taxes or to exact compensation for the privilege of using the streets; and it will be found interesting and important to consider whether wires once put up under municipal license may be removed by the city authorities, and whether and on what terms they may be removed by the legislature itself. May the wires be ordered to be taken down from the poles and put under ground; and, if so, by whose authority and on what terms may the companies themselves insist on using subways instead of poles, and how shall the use of subways for various kinds of wires be regulated? These and similar questions are suggested; but to answer them properly would involve the discussion of the whole subject of municipal and legislative franchises, and I cannot attempt to do more than refer to the general principles and leading cases on the subject at large and then state what has been decided with special reference to electric wires. These cases are not very numerous, and it is better in the present stage of development of this branch of the law to let the cases speak for themselves than to attempt to lay down rules.

Another matter involving public rights in the highways is the privilege secured by act of congress to all telegraph companies alike to use the post roads of the United States. This has some bearing upon state and municipal control, but it is more frequently discussed in connection with lines along railroads, and may be considered in connection with the mutual rights of telegraphs and railroads.

2. PRIVATE RIGHTS.—*The relation of the street to the owner of abutting land and his rights in the street.*

Do the several uses of the electric wires in the streets affect private rights, either by imposing a new servitude upon the land, or by infringing the owner's rights in the street, so that compensation must be made?

This involves a discussion of the interesting and difficult question, what the rights of the abutting owner in the street are, and what public uses may be made of the street without

affecting those rights of the adjoining owner. The courts hold different views of the proper uses of the streets and as to what amounts to a perversion of the purpose for which the land is taken. Distinctions are made between those cases in which the fee of the street is in the public and those in which the public have only a right of way. Doubt has been thrown by recent decisions on the soundness of this distinction, and the courts are beginning to recognize clearly the right of access and light and air and other privileges of adjacency to a street as substantial rights of property.

The questions of the proper uses of the street, of the ownership of the soil and the rights of adjacency are all involved in the discussion, and we cannot attempt to decide whether one or all are sufficient to give a firm basis of principle on which to decide whether any or what rights of the land-owners are affected by the use of the streets for electric wires for the various purposes to which they are or may be applied. The subject belongs to the broader topic of the eminent domain with respect to streets and highways, and is fully considered in the standard text-books. We need only refer to the general principles and then we may take up in detail the various uses for electric wires: First, the telegraph and telephone; secondly, electric light; thirdly, electric power; and fourthly, the electric railway. In discussing these it will be necessary to refer to the decisions upon other and analogous uses of the streets and roads, as, for instance, for gas and oil pipes, for steam railroads, horse railroads and elevated railroads, for dummy engines and for cable railways; and it will be useful to compare the decisions upon one kind of electric wires with those upon another, with a view to reaching a common and stable basis of decision with respect to all such uses of the streets.

Assuming it to be settled that private rights are affected, the question will then arise, How are proceedings to be taken to subject them to public use on making due compensation? and we must, therefore, examine such cases as may be found on proceedings to condemn lands or rights of property for laying out lines of telegraph and telephone, electric light and other electric wires.

In connection with this we may consider the right to construct a telegraph line on the right of way of a railroad com-

pany, and whether such a right may lawfully be made exclusive. This involves the act of congress with respect to post roads, and this statute itself has been the subject of many interesting decisions with respect not only to contracts with railroad companies, but also to the rights of states and municipalities to interfere with this instrument of commerce between the states.

Another question involving private rights of property arises out of the fact that the use of the streets for one kind of current of electricity may interfere with the use of them for another, and there have been a number of decisions made upon the complaint of the telephone companies that their business is interfered with and their property injured by the more powerful currents used for the electric light and the electric railway.

There are other questions supplemental or incidental which will require some attention, and especially the liability for injuries sustained by reason of unlawful or unnecessary obstruction of the streets, or by reason of negligence in constructing or operating lines of electric wires. This will involve the question what precautions the companies must take against violent storms which may throw down their poles, and to what extent they are bound to prevent their dangerous currents of electricity from injuring persons and property.

It is, as I have said, too early in the development of the law in its application to these subjects to do anything more than to refer to general principles and to collect the cases in which they have been applied to the use of these wires. I have, therefore, stated the cases somewhat in detail so that these pages may at least furnish the means of ascertaining what has been decided on these subjects up to the present time, even if they do not always show that any very definite basis of decision has yet been agreed upon.

CHAPTER II.

FRANCHISES—LEGISLATIVE AND MUNICIPAL

BY WHAT AUTHORITY THE STREETS MAY BE USED FOR ELECTRIC WIRES.

§ 4. **Introductory.**—The question of the authority to use the streets for electric wires is, of course, a part of the broader question of the control of the streets, and the right to grant special privileges with respect to particular public uses. It involves the relations of the legislature and the municipal corporation to the streets, the extent of the powers delegated to the local authorities, and the question what are the proper uses of a public street or highway. All these questions have been fully considered in many elaborate works on municipal corporations, eminent domain and streets and highways.

§ 5. **Analogies and general principles.**—It is only necessary in dealing with the use of the streets for electric wires to state briefly the general principles bearing upon these subjects, and to refer to the standard text-books and a few important cases. The conclusions that have already been reached with respect to street railroads or gas pipes in streets may be used by way of analogy or distinction in considering the electric railway, the telegraph and the electric light, and we may devote our attention especially to the cases decided with respect to these uses of the streets for the transmission of electricity.

In considering the question by whose authority permission may be granted, whether it may be given by the municipal or other local government, or must come from the legislature, we may assume that the same principles apply to the use of the streets for electric wires as to the use of them for analogous purposes..

§ 6. **The power over the streets belongs to the legislature.** It is well settled that the use of the streets belongs to the public at large as distinguished from the municipality, that the legislature represents the public, and that the municipality has

no control over the streets except what is given to it by the legislature, either expressly or by implication.¹

The legislature has (in the absence of constitutional restraint, and subject to the property rights and easements of the abutting owner) full and paramount authority over all public ways and public places.²

"The authority to make use of the public streets of a city for railroad purposes primarily resides in the state and is a part of the sovereign power. City authorities have no power to grant the right, except in so far as they may be authorized by the legislature, and then only in the manner and upon the conditions prescribed by statute."³

"The public easement in the highways," says Mr. Justice Magie, of New Jersey, "is vested in the public, and can be divested by nothing short of an exercise of sovereign power. The legislature, representing the public, may release the public right by vacating the highway, may modify the public use by granting a right to use the highway for a horse railroad, or may restrict the public use by granting a right to erect poles and other obstructions in the highway. What the legislature can thus do, it may delegate authority to do. . . . No reason appears why all such authority possessed by the legislature may not be thus delegated. But the delegation of such power must plainly appear either by express grant or by necessary implication."⁴

¹ State, Hoboken Land Imp. Co., pros., v. Hoboken, 35 N. J. L. 205; Case of the Phila. & Trenton R. R. Co., 6 Whart. 25; State, Jacksonville v. Jacksonville St. Ry. Co., 29 Fla. 390, 10 S. Rep. 590.

² 2 Dill. Mun. Corp. (4th ed.), §§ 657, 683, and cases cited.

³ Beekman v. Third Ave. R. R. Co., 153 N. Y. 144, 47 N. E. Rep. 277.

⁴ Domestic Tel. & Teleph. Co. v. Newark, 49 N. J. L. 344-346, 2 Am. El. Cas. 141 (1887). See also New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683; New Orleans Water Works Co. v. Rivers, 115 U. S. 674; Citizens' Water Co. v.

Bridgeport Hydraulic Co., 55 Conn. 1; East Portland v. Multnomah, 6 Oreg. 62; 2 Dill. Mun. Corp., §§ 695, 696; Atlantic City Water Works v. Atlantic City, 39 N. J. Eq. 366, 374; modified in Atlantic City Water Works Co. v. Consumers' Water Co., 44 N. J. Eq. 427-432; State v. Milwaukee Gas Light Co., 29 Wis. 454; State, Jacksonville v. Jacksonville St. Ry. Co., 29 Fla. 590, 10 S. Rep. 590; Florida Cent. & P. R. Co. v. Ocala St. & S. R. Co., 39 Fla. 306, 22 S. Rep. 692; Knoxville v. Africa, 77 Fed. Rep. 501, 47 U. S. App. 74; Wright v. Nagle, 101 U. S. 791, 794; City Ry. Co. v. Citizens' St. R. Co., 166 U. S. 557.

See, however, 2 Dill. Mun. Corp.

§ 7. Power of municipality is only what is delegated.—The extent, therefore, of the power of the municipality depends upon the breadth of the charter or statutes authorizing municipal action. The legislature may perhaps delegate to the municipal government absolute control over the streets, with express power to dispose of the public rights therein for public purposes; and the question whether in any particular case the local authorities have power to grant a franchise must be decided by reference to the local statutes.¹

§ 8. Extent and limits of ordinary powers of municipality. The power of the municipalities is strictly confined to the public rights; they cannot exercise the power of eminent domain, and therefore they cannot do anything which involves the taking of private property for public uses, and for this reason a full discussion of the extent of the power of the municipality involves a discussion of the question whether the proposed use of the street is one that imposes a new burden on the land or affects in any way the property rights of owners of adjoining land; and this question must be considered by itself and at some length when we come to deal with the private rights affected by the telegraph and electric railway and other lines of wires for electric purposes.

§ 9. The same continued — Municipalities cannot grant exclusive franchises.—It is well settled that municipalities have not the power to grant an exclusive franchise or a permanent privilege in the use of the street;² and it is no doubt because such permission to use the streets for railways or electric wires must, if they are to have any value, be to a certain extent exclusive, that special provision is made by statute for

(4th ed.), § 693; *Norwich Gas Light Co. v. Norwich City Gas Light Co.*, 28 Conn. 19, where it was held not only that the city had no power to grant an exclusive property interest in the streets, but also that such a grant by the state to a gas company for the purpose of laying pipes was void as a monopoly.

¹ 2 Dill. Mun. Corp. (4th ed.), §§ 680, 719, and notes citing many cases.

² *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19; *Minturn v.*

Larue, 23 How. (U. S.) 435; *Wright v. Nagle*, 101 U. S. 791; *Jackson County Horse Railroad Co. v. Rapid Transit Co.*, 24 Fed. Rep. 306; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. Rep. 529; *State v. Cincinnati Gaslight and Coke Co.*, 18 Ohio St. 262; *Stein v. Bienville Water Supply Co.*, 34 Fed. Rep. 145, with note; *Dillon, Mun. Corp.* (4th ed.), §§ 362, 395, and notes citing cases. See also note 3, p. 10, *infra*.

conferring legislative authority upon corporations organized for the purpose of exercising such franchises.

The legislature, unless specially limited by the constitution, has the right to grant an exclusive, indefinite and irrevocable franchise for the use of the streets,¹ although such a grant must be made in explicit language, and will not be implied;² but without express legislative authority, no municipality has the right to grant an exclusive, indefinite franchise,³ and it has been held in many cases that a city has no right to grant an exclusive right, even for a limited time.⁴

In *Grand Rapids Electric Teleg. Co. v. Grand Rapids Edison, etc. Co.*,⁵ it appeared that a city, having only a general power to light streets, adopted an ordinance granting to an electric light

¹ 2 Dill. Mun. Corp. (4th ed.), §§ 691, 692, 693, 694, 695, 696, and notes; Elliott on Streets, p. 332; Cooley, Const. Lim. (6th ed.), p. 342; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683; New Orleans Water Works Co. v. Rivers, 115 U. S. 674; Citizens' Water Co. v. Bridgeport Hydraulic Co., 55 Conn. 1; State v. Milwaukee Gaslight Co., 29 Wis. 454; Atlantic City Water Works Co. v. Atlantic City, 39 N. J. Eq. 367. See, however, 2 Dill. Mun. Corp. (4th ed.), § 693, and Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19 (1856); and as to the effect of express legislative warrant, Atlantic City Water Works Co. v. Atlantic City, 48 N. J. L. 379.

² 2 Dill. Mun. Corp. (4th ed.), § 695; 1 Ibid., § 362; People v. Benson, 30 Barb. 24; Cooley, Const. Lim. (6th ed.), 250; Milhau v. Sharp, 17 Barb. 435 (1854); S. C., 28 Barb. 228, 27 N. Y. 611; Detroit Citizens' St. Ry. Co. v. Detroit Ry. Co., 171 U. S. 48 (1898).

³ See note 2, p. 9, and note 2, p. 10; also Grand Rapids Electric Teleg. Co. v. Grand Rapids Edison, etc. Co., 33 Fed. Rep. 659; Milhau v. Sharp, 27 N. Y. 611; State of New York v. Davis, Mayor of New York, 3 Duer, 119; St.

Louis, A. & T. H. R. R. Co. v. Belleville, 20 Ill. App. 580; People's Pass. Ry. Co. v. Memphis (Tenn., 1875), 16 S. W. Rep. 973; Citizens' St. Ry. Co. v. City Ry. Co., 56 Fed. Rep. 746 (1893), 64 Fed. Rep. 647, 166 U. S. 557 (1896); Parkhurst v. Capital City R. R. Co., 23 Ore. 471, 32 Pac. Rep. 304 (1893); North Baltimore Pass. Ry. Co. v. Baltimore, 75 Md. 247, 23 Atl. Rep. 470 (1892); New Orleans City & Lake R. Co. v. New Orleans, 44 La. Ann. 728, 11 S. Rep. 78 (1892); Columbus Water Works Co. v. Columbus, 48 Kan. 99, 28 Pac. Rep. 1097 (1892); Crowder v. Sullivan (Town of), 128 Ind. 486, 28 N. E. Rep. 94 (1891); Henderson v. Ogden City Ry. Co., 7 Utah. 199, 26 Pac. Rep. 286 (1891); Detroit Citizens' St. Ry. Co. v. Detroit, 110 Mich. 384, 68 N. W. Rep. 304 (1896); Hibbard v. Chicago, 173 Ill. 91, 50 N. E. Rep. 256 (1898); Detroit v. Detroit City Ry. Co., 56 Fed. Rep. 867, 64 Fed. Rep. 628, 171 U. S. 48.

⁴ Grand Rapids Elect. Teleg. Co. v. Grand Rapids Edison, etc. Co., 33 Fed. Rep. 659; State v. Cincinnati Gas & Coke Co., 18 Ohio St. 262 (1868); Cincinnati Street R. R. Co. v. Smith, 29 Ohio St. 291-303.

⁵ 33 Fed. Rep. 659, U. S. C. C. W. D. Mich. (1888).

company the exclusive right to use the streets for fifteen years. It was held that the grant was void for want of power. Jackson, J., insisted that, upon principle and under the decisions, the authority to grant an exclusive franchise involves the exercise of the whole sovereign power, and that if the city has power to make an exclusive grant for fifteen years, it has the power to make such a grant for an indefinite time, and if it has not power to make the grant for the longer time, it has not the power to make it for the shorter. "It requires the whole exclusive power and control to grant either the one or the other."

While the legislature has the power to confer extensive powers upon municipalities with a view to local self-government, yet the courts, for reasons of public policy, are inclined to construe such grants very strictly, and to hold that exclusive franchises are not conferred unless the language is explicit. The supreme court of the United States in a recent case¹ says: "That such power must be given in language explicit and express, or necessarily implied from other powers, is now firmly fixed. There are many reasons which urged to this — reasons which flow from the nature of the municipal trust — even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared, insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges."

The question resolves itself finally into a question of the extent of the power granted to the municipality by the charter or other law in any particular case; and since the same question is involved in many other franchises, it cannot be discussed in detail without going beyond the cases on electric wires.²

Where the constitution of a state prohibits the legislature

¹ *Detroit Citizens' St. Ry. Co. v. Detroit Ry. Co.*, 171 U. S. 48-53 (1897).

² The power of municipal corporation to grant an exclusive franchise and create a monopoly is discussed in 36 *Am. & Eng. R. R. Cas.* 116, note, where the American decisions are collected. See also 2 *Dill. Mun. Corp.*,

§§ 693-696, and notes above referred to.

The validity of grants by municipalities of the use of the streets is discussed in an article by W. W. Thornton in 41 *Alb. Law Jour.* 104.

In *Citizens' St. Ry. Co. v. Jones*, 34 *Fed. Rep.* 579, a grant by a city of ex-

from passing any local or special law conferring exclusive privileges or franchises, it would seem that no such franchises could be conferred by any municipality created by the legislature, for otherwise the legislature could accomplish through a corporation of its own making what it could not do itself directly.¹

§ 10. Ordinary powers of municipalities with respect to the streets, continued.—Under the powers ordinarily granted to municipal corporations they have the care, supervision and control of the streets, the power to open, grade and regulate, to alter and to vacate them. Under the power to grade it has been held that they may take away the access to vacant land without making compensation.² And under the power to grade

clusive rights to all the streets for ninety years was held not to confer such a right in any particular street, where the grant had not been acted upon and the right had not been acquired by use, although the city was specially authorized by statute to contract for providing the city with railroads and conferring for the time agreed upon an exclusive franchise.

In Indianapolis Cable Street Ry. Co. v. Citizens' St. R. Co. (Ind.), 8 L. R. A. 539, 24 N. E. Rep. 1054, it was held that a grant to use all the streets of a city for a cable street railroad was not to be construed as exclusive until actually acted upon in good faith by the building of a cable road, and then only so far as the proposed system required it for actual use.

In a case in which the grant was not in terms exclusive, it was held that a contract giving the company the use of the streets for gas pipes for twenty-five years was not invalid. Vincennes v. Citizens' Gas Light Co., 132 Ind. 114, 31 N. E. Rep. 573 (1892).

It has been held that the grant of the right to use the streets is not invalid, even though the provision that it be perpetual may be invalid. Lewis v. Newton, 77 Fed. Rep. 884.

For collections of authorities on

municipal control of streets, see *Daly v. Ga. So. & Fla. R. R. Co.*, 26 Am. & Eng. R. Cas. 27, n.; *Iron Mountain R. R. Co. v. Bingham*, 4 L. R. A. 622, n. See also *Appeal of Meadville Fuel Gas Co.*, 4 Atl. Rep. 733 (Pa. Sup. Ct., May 31, 1886); *New Orleans City R. R. Co. v. Crescent City R. R. Co.*, 12 Fed. Rep. 308; *Davenport v. Kleinschmidt* (Sup. Ct. Mont., 1887), 13 Pac. Rep. 249; *Detroit Citizens' St. Ry. Co. v. Detroit Ry. Co.*, 171 U. S. 48-53; *Attorney-General v. Walworth Light & Power Co.* (Mass.), 31 N. E. Rep. 482; *Wilkesbarre Elect. Light Co. v. Wilkesbarre L. H. & M. Co.*, 4 Kulp (Pa.), 47; *Florida Cent. & P. R. Co. v. Ocala St. & S. R. Co.*, 39 Fla. 206, 22 S. Rep. 692.

¹It has been held that even where there is such a constitutional provision, a municipality has the power to grant a franchise that is not exclusive. *Henderson v. Ogden City Ry. Co.*, 7 Utah, 199, 23 Pac. Rep. 286.

On the subject of exclusive franchise and general laws, see *Atlantic City Water Works Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427; *Columbus Water Co. v. Columbus*, 48 Kan. 99, 28 Pac. Rep. 1097; 5 Am. R. R. Corp. Rep. 724 and note, p. 740; 33 Fed. Rep. 659 (U. S. C. C., W. D. Mich.); 2 Am. El. Cas. 152 (1888).

²*State, Newark v. Sayre*, 47 N. J. L.

and vacate, it has been held that on making compensation they have the power to raise the level of a street and build abutments of a bridge for the purpose of crossing over a railroad track.¹

They have the power to remove obstructions, and even to authorize certain obstructions which are commonly allowed in the streets by custom, or are incidental to the ordinary uses of a street. They may, for example, permit a line of shade trees to remain or to be planted along the foot path, or even along the middle of the street.² They may permit or authorize hitching posts and drinking fountains as incidents to travel.

It is very common for them to permit awnings to hang over the sidewalks, and posts for their support to stand along the edge of the street. But it has been held that if the awning is in fact a public nuisance, or in violation of the general ordinances of the city, the common council may abate it, even though a previous council has given permission to maintain it; and the court in one case said that the council had no power to grant the permanent use of the street for the private purpose of maintaining a glass roof over the sidewalk.³

It is generally admitted that cities have the right to authorize the construction of sewers and drains,⁴ although the sewers are used for draining private houses as well as the streets, and the former use has nothing to do with public travel. They may maintain wells and cisterns⁵ in the streets for public pur-

158. See also Elliott on Roads, 335, 336, 345.

¹ See Reed v. Camden, 53 N. J. L. 322, where, however, there was also a statute specially authorizing cities to make contracts with railroad companies whereby the companies might "relocate, change or elevate" their roads.

² In Massachusetts the trees by statute belong to the adjoining owner and can only be cut down by order of the mayor and council. White v. Godfrey, 97 Mass. 472; Bliss v. Ball, 99 Mass. 597.

³ Farrell v. Mayor, etc. of New York, N. Y. Supreme Court, Special Term, Dec. 18, 1888; Lawrence, J., 5 N. Y.

Supp. 672, referring to Ely v. Campbell, 59 How. Pr. 333; People v. Mayor, etc., 59 How. Pr. 277, relating to stalls and market wagons in the streets, and denying the power of the common council to authorize permanent obstructions; Hibbard v. Chicago, 173 Ill. 91, relating to an awning of glass and iron supported on posts.

⁴ 2 Dill. Mun. Corp. (4th ed.), §§ 688, 689 (542); Traphagen v. Jersey City, 29 N. J. L. 206, 246; Michener v. Philadelphia, 18 Pa. St. 535; McKevitt v. Hoboken, 45 N. J. L. 403; Elliott on Roads & Streets, p. 360; Lewis on Em. Dom., § 127.

⁵ Lostutter v. Aurora, Indiana Supreme Court, January 8, 1891, 12 L.

poses, and may lay pipes there for a public water supply.¹ So, also, "lighting cities is so necessary," says Judge Dillon, "for the safety and convenience of the inhabitants that municipal authorities are usually given more or less extensive powers in respect to it."² Power to light the streets, of course, involves power to set up lamp posts and lay down gas pipes for the purpose of supplying the lamps with fuel; and there is no doubt that, under the general power to light the city, the corporation may lay gas pipes for its own use or authorize others to use them. The streets of cities "for many years have been used for the construction of sewers and for laying water and gas pipes, and no one has ever seriously questioned the right of the city to authorize their use for such purposes, and no adjoining owner . . . ever pretended to claim compensation for such use;"³ and yet, while custom has sanctioned the use of the streets for placing thereon gas and water pipes, it has always been exercised under legislative authority.⁴

It is because of the general rule that "no person can acquire a right to make a special or exceptional use of the public highway not common to all the citizens of the state, except by grant of the sovereign power," that it has been held that "the right to use the public streets of a city is a franchise which the state alone can confer."⁵ But whether such power to grant such a right is delegated to any city depends on the ex-

R. A. 259; *West v. Bancroft*, 32 Vt. 367. Although this not undisputed. *Dubuque v. Maloney*, 9 Iowa, 450. See 2 Dill. Mun. Corp. (4th ed.), § 690, and note citing cases, and *Elliott on Roads*, etc., 305-308, with notes.

¹ 2 Dill. Mun. Corp. (4th ed.), § 697; *Lewis, Em. Dom.*, § 138.

² 2 Dill. Mun. Corp. (4th ed.), §§ 691, 692; *State v. Cinc. Gas Light & C. Co.*, 18 Ohio St. 262 (1868); *Richmond County Gas Light Co. v. Middletown*, 59 N. Y. 228. In England it has been held that the right to lay down gas pipes in a highway can only be conferred by legislative authority. *Queen v. Charlesworth*, 16 Q. B. 1012. And the same is true in America of country highways. *Bloomfield & R.*

N. Gas L. Co. v. Calkins, 62 N. Y. 386; *Sterling's Appeal*, 111 Pa. St. 35. The authority must be purely incidental and in furtherance of the right to control the streets. *Richmond Co. Gas Light Co. v. Middletown*, 59 N. Y. 228; *Dodge v. Davenport*, 57 Iowa, 560.

³ *Milhau v. Sharp*, 15 Barb. (N. Y.) 193-210 (1853).

⁴ *State, Montgomery v. Trenton*, 36 N. J. Law, 79.

⁵ *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242. See also *Boston v. Richardson*, 13 Allen, 146; *Norwich Gaslight Co. v. Norwich City Gaslight Co.*, 25 Conn. 19; *State v. Cincinnati Gaslight, etc. Co.*, 18 Ohio St. 262, 291.

tent of the powers conferred upon it, and this depends somewhat upon the character of the city and the nature of the uses for which its streets may be required.

Larger powers are given to cities than to villages, and the uses to which city streets may be put are more numerous and various than those to which a common highway may be applied by the township officers.¹

In all these cases the authority of the municipality is confined to those things that are incidental to and in furtherance of the power given by statute to regulate and control the streets.

There has been some question as to the right of a city, even with the sanction of the legislature, to authorize a company to lay gas pipes in the streets for general use without making compensation to the land-owner.² Yet the better opinion is that this is a legitimate use of the streets, for which no compensation need be made.³ And it is certain that under the general power to light the city, the corporation may lay gas pipes for its own use, or authorize others to lay them for that purpose.

§ 11. Question whether the various electric wires come within these lines.—Whether the various uses of the electric wires come within these implied powers or not depends a good deal on the purpose for which the wires are used, and on the answer to the question whether or not they are within the proper uses of a street or constitute a new burden upon the land. The discussion of this question requires a separate consideration of the several uses, and must be reserved until later. The principles that govern this subject are discussed in works on the powers of municipal corporations and on streets and highways, and in particular cases the answer depends so much upon the

¹ Elliott on Roads, p. 299; 2 Dill Mun. Corp. (4th ed.), § 688; Lostutter v. Aurora, 12 L. R. A. 259 (Ind., 1891, Elliott, J.).

² Milhau v. Sharp, 15 Barb. 210 (1853); Norwich Gaslight Co. v. Norwich City Gaslight Co., 25 Conn. 19 (1856).

³ Lewis, Em. Dom., §§ 126, 129; 2 Dill. Mun. Corp. (4th ed.), § 691, note, and cases cited. It has been held

that pipes for conveying natural gas along a highway for the purposes of fuel cannot be laid without compensation to the land-owner. Sterling's Appeal, 111 Pa. St. 35; Kincaid v. Indiana Nat. Gas Co., 121 Ind. 577 (1890), 8 L. R. A. 602, 24 N. E. Rep. 1066, 19 Am. St. Rep. 113; Lahr v. Metropolitan EL Ry. Co., 104 N. Y. 268, 292.

language of charters or statutes that it seems unnecessary to examine closely into the question whether, as a matter of legal theory, a municipal corporation with ordinary powers has a right to grant permission to set up telegraph, telephone or electric-light lines, or to construct an overhead system for furnishing electric power to the street railway. As a matter of fact, provision is generally made by statute for obtaining such franchises upon complying with certain conditions and obtaining a designation of the streets from the local authorities, and the question does not often arise whether, without special legislative authority, a grant of power to use the streets for such purposes may be made by a municipal corporation.¹

§ 12. Powers of cities to grant the privilege with respect to these and similar uses — Steam and horse railroads.— It may be well, however, to refer to a few cases in which it has been held that these or similar privileges may or may not be conferred by municipal grant. It has frequently been held that a city cannot give permission to use the streets for the operation of an ordinary steam railroad.² With respect to horse railroads there is some difference of opinion. Judge

¹ The extent of the power of the municipality depends very much on the language of the charter or statute, and in comparing the decisions in different states it is important to examine the statutes. See *Beeson v. Chicago*, 75 Fed. Rep. 880-882, per Grosscup, J.

² *Dill. Mun. Corp.* (4th ed.), § 705; *Cooley, Const. Lim.* (6th ed.) 250, 671; *Savannah, Albany & Gulf R. R. Co. v. Shiels*, 33 Ga. 601 (1863); *State, Montgomery v. Trenton*, 36 N. J. L. 79; *Chamberlain v. Elizabethport, etc. Co.*, 41 N. J. Eq. 43; *Reichert v. St. Louis & S. F. Ry. Co.*, 51 Ark. 491, 11 S. W. Rep. 696 (1889), 5 L. R. A. 183, 33 Am. & Eng. Cas. 453.

As to the necessity for legislative authority to lay a railroad in the street, see *Pennsylvania Railroad's Appeal*, 115 Pa. St. 514; *Jersey City & Bergen R. R. Co. v. J. C. & Hoboken R. R. Co.*, 20 N. J. Eq. 61; *Morris & Essex R. R. Co. v. Newark*,

10 N. J. Eq. 352. See also on the distinction between steam railroads and horse railroads, chapter X (*Electric Railways*).

In Kentucky steam railroads were treated in early cases as ordinary highway uses, and, a railroad company having legislative authority to construct a road, municipal consent was held to give it authority to use the streets of a city. *Louisville & Frankfort R. R. Co. v. Brown*, 17 B. Monr. 763.

In Illinois and Iowa it is held that cities may authorize the laying of steam railroad tracks in the streets. *Chicago & Vincennes R. R. Co. v. People*, 92 Ill. 21; *Milburn v. Cedar Rapids R. R. Co.*, 12 Iowa, 246; *Cook v. Burlington*, 30 Iowa, 94, 6 Am. Rep. 649, 36 Iowa, 357. See 1 *Redfield on Railways*, § 76, and notes, 6th ed.

In reading Missouri cases it is to be observed that special and plenary

Dillon says (§§ 717 and 724) that the power must come from the legislature, but that the ordinary powers are often ample enough to authorize cities to allow the streets to be used for local travel by means of such railroads, although they cannot confer corporate franchises nor authorize taking of tolls.¹ It was decided in New York, in 1856, that an exclusive right could not be thus granted; but on the question whether the municipality might, by a mere license, revocable at pleasure, authorize persons to build such a railroad, the judges were divided.² The New Jersey supreme court said, in 1872, that the power had never been exercised in that state under a mere grant of power to regulate streets, and that the attempt to assert it would doubtless provoke the most determined resistance.³

It is certainly true that the right to operate a horse railway is a privilege giving the cars the preference in the right of way over other vehicles, so that a line of omnibuses, for example, will not be allowed to run regularly upon the tracks to the injury of the business;⁴ and although it is well settled that horse railroads are a legitimate use of the streets for public travel, it is usually necessary to have special legislative authority to operate a line with all the privileges that are generally required.⁵

power with respect to railroads is given by charter to the city of St. Louis.

¹ Judge Dillon's text was quoted with approval in *State v. Corrigan* St. Ry. Co., 85 Mo. 263.

² *Davis v. New York*, 14 N. Y. 506.

³ *State, Montgomery pros., v. Trenton*, 36 N. J. L. 79, 83.

⁴ *Camden Horse R. R. Co. v. Citizens' Coach Co.*, 31 N. J. Eq. 525.

⁵ *Lewis, Em. Dom.*, § 125; *Attorney-General v. Metropolitan R. R. Co.*, 125 Mass. 515, 28 Am. Rep. 264; *Stanley v. Davenport*, 54 Iowa, 463; *Hinchman v. Paterson Horse R. R. Co.*, 17 N. J. Eq. 75; *Jersey City & Bergen Ry. Co. v. Jersey City & Hoboken Horse R. R. Co.*, 20 N. J. Eq. 61; *Sixth Ave. R. R. Co. v. Kerr*, 45 Barb. 138; *Galbreath v. Armour*, 4 Bell App.

Cas. 374; *Boston v. Richardson*, 13 Allen, 146; *Sears v. Marshalltown St. Ry. Co.*, 65 Iowa, 742; *Redfield on Railways* (3d ed.), p. 317; *Mahady v. Bushwick R. R. Co.*, 91 N. Y. 148; *Eichels v. Evansville St. R. Co.*, 73 Ind. 261, 41 Am. Rep. 561; *Hiss v. Baltimore & Hampden Pass. Ry. Co.*, 52 Md. 242, 36 Am. Rep. 371; *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255, and note; *Adams v. Chicago, B. & N. Ry. Co.*, 39 Minn. 286, 1 L. R. A. 493; *People v. Newton*, 112 N. Y. 396, 3 L. R. A. 194; *Attorney-General v. Lombard & South St. Pass. Ry. Co.*, 32 Leg. Int. (Pa.) 238, 1 W. N. Cas. 489; *People's Ry. Co. v. Memphis (Tenn.)*, 16 S. W. Rep. 973 (1875); *State, Jacksonville v. Jacksonville St. Ry. Co.*, 29 Fla. 590, 10 S. Rep. 590.

But in Iowa it is the well-settled

§ 13. The same—Electric railways.—The electric railway, as now commonly operated by the overhead system of poles and wires, differs from the horse railway, not in the purpose of its operation nor in the mode of using the street, but in the fact that poles are set up at intervals along the street and wires are strung overhead for the purpose of supplying electricity to the motors. It has been held in many cases to which I shall refer hereafter, that since there is no change in the purpose or manner of the use of the streets, and since the poles and wires are necessary and incidental to the use of the streets for this mode of public travel, there is no additional burden imposed upon the land and no trespass committed upon the adjoining owner. The decision of this question has an important bearing on the question whether it is within the power of the municipality to grant such a privilege; but since it is doubtful whether even horse railroads may be authorized without special legislative sanction, and since the railroads are usually constructed under legislative authority of some kind, we need only refer here to the cases cited and discussed in the following sections of this chapter and in the chapter on the Rights of Abutting Owners with Respect to the Electric Railway.¹

§ 14. Power of municipality to authorize street railway companies to use poles and electric wires.—Supposing the legislature to have authorized the operation of a street railway in the streets of a city, and by the original or a subsequent

doctrine that cities may authorize the construction of street railways. *Damour v. Lyon*, 44 Iowa, 276. *Aliter* of steam railways. *Stanley v. Davenport*, 54 Iowa, 463, 37 Am. Rep. 216.

In Indiana it is held that under section 3161, Revised Statutes (1881), an incorporated city has exclusive power over streets and may grant a railway company power to lay down tracks along and across streets. *Kistner v. Indianapolis*, 100 Ind. 210. See also *Carli v. Stillwater St. Ry. Co.*, 28 Minn. 373, 41 Am. Rep. 290; *Perry v. New Orleans M. & C. Ry. Co.*, 55 Ala. 413, 28 Am. Rep. 740. But in *Citizens' St. Ry. Co. v. City Ry. Co.*, 56 Fed. Rep. 746, United States circuit court

for the district of Indiana, speaking of an ordinance giving an exclusive franchise to an electric street railway company, the court said that the grant of the right to use the streets for a street railway was necessarily a legislative grant; that the use of them without such a grant would be a nuisance, and that a city, in the absence of a legislative grant of authority to it, cannot confer such a right upon any one. The supreme court of the United States, in reviewing the final decree in this case, declined to decide the question whether the complainant had a perpetual franchise. 166 U. S. 557.

¹Ch. II, §§ 11-24, and ch. X.

grant to have authorized the use of electric motors, is it competent for the municipal authorities to permit and regulate the construction of what is called the overhead system for supplying the electricity? On this question there has been some difference of opinion among the courts. Under an express grant by the legislature of the right to use poles and wires, the city council would of course have power to regulate the use and designate the size and location of the poles, and so give the company their consent to the use of the streets in the manner required; but when the statute provides generally for the use of electric motors, the question may arise whether this gives, by implication, the right to use this means of supplying the electricity, and this may depend on whether, at the time of the passage of the act, the use of the term "electric motor" in connection with street cars implied the use of poles and wires for supplying the electricity. Before stating the cases on this subject I may suggest that since the right to construct and operate has been given, and such a railway has been held to be a proper use of the street and no trespass on the land, and since the poles and wires are used as necessary or convenient means of supplying the power, and are not in themselves a greater obstruction of the streets than lamp posts or hitching posts, or shade trees, it may well be that, if power is given by the legislature to use electricity, the local authorities, under their power to regulate streets, may permit poles to be set up in such a way as, in their judgment, will not interfere with public travel, and may provide for stretching the wires required to facilitate travel in the street cars.

The municipality has not the power to divert the street or any part of it from its proper uses as a street, nor to impose a new burden on the land, nor to affect any of the rights of the land-owner in the street, and whether the use of the electric railway with the overhead system does any of these things must be the subject of a separate chapter; and in considering the rights of the abutting owner I shall examine all the cases relating to the use of the streets by the electric railway. I need only refer now to those in which the power of the municipality has been especially considered.

§ 15. The same subject — Cases — *Taggart v. Newport Street Ry. Co.* — The question came before the supreme court

of Rhode Island in *Taggart v. Newport Street Ry. Co.*,¹ on a bill filed by a property owner for injunction against the erection of the overhead electric system. The act under which the company was incorporated provided that the road might be operated "with steam, horse or other power, as the council of the city might from time to time direct." The common council of Newport passed an ordinance giving the company permission to use the overhead system, with poles along the curbstone and wires suspended over the tracks. The court held that the charter of the company was broad enough to authorize the use of electric power, and that the words "other power" were not to be confined to animal power, but that, "as the charter was passed in the winter of 1885, when the idea that electricity might be brought into use as a motor was familiar, it seems probable that the words 'other power' were used with a view to its possible employment." They said the poles and wires were directly auxiliary to the ordinary uses of the street in furnishing the power by which street cars were propelled; that the electric railway did not constitute a new burden, and that the ordinance was valid.

§ 16. The same — *Mt. Adams & Eden Park Inclined Ry. Co. v. Winslow*. — In November, 1888, it was decided by the court of common pleas of Hamilton county, Ohio, that poles and wires for the electric railway were an additional burden upon the land used for a street, and that a land-owner who had not received compensation was entitled to a mandatory injunction for the removal of the poles.² On appeal to the circuit court of Hamilton county the decision was reversed,³ and it was held that the use of the streets for horse cars was a proper one, and that the change of the motive power to electricity made no difference, and the poles and wires being used for the purpose of facilitating public travel imposed no new burden on the land. The permission to make the change, and to put up the poles and wires, was given by the common council, and

¹*Taggart v. Newport St. Ry. Co.*, January 25, 1890, 16 R. I. 663, 19 Atl. Rep. 326, 2 Am. Ry. & Corp. Rep. 55, with note, 43 Am. & Eng. R. R. Cas. 203, 7 L. R. A. 205, with note, 3 Am. El. Cas. 306. See also this case quoted *infra*, ch. X, § 19.

²*Mt. Adams & Eden Park Inclined Ry. Co. v. Winslow*, 20 Week. Bull. 420.

³S. C., 3 Ohio Circuit Ct. Rep. 425, 2 Am. El. Cas. 262.

the court held that the plaintiff, an abutting land-owner, was not entitled to an injunction. The right of the common council to grant the permission was not discussed, but it must have been assumed that the grant was sufficient, or else that the point was not one which could be taken by the adjoining land-owner.

§ 17. **The same — Lonergan v. Lafayette Street Ry. Co.**— In *Lonergan v. Lafayette Street Ry. Co.*, decided by the circuit court at Lafayette, Indiana, July 9, 1890,¹ it appeared that the statute under which the defendant company was organized provided for the incorporation of any "street or horse railroad company for the purpose of constructing street or horse railroads through the streets of the cities and towns" of Indiana. The act was entitled "An act to provide for the incorporation of street railroad companies," and was passed in 1881. The city gave the company license in 1882 to operate their road by horse or electrical power. The court held that the legislature must be supposed to have contemplated new discoveries and inventions, and that they must not be understood as meaning to exclude the new and useful appliances that might be invented, and that the language of the act was broad enough to cover a street railroad, whether the cars are drawn by horses or propelled by electricity. It was held also that there was no change in the use of the street, and that neither in the use of poles nor by reason of danger and noise was there a new servitude imposed upon the land.

§ 18. **The same — Louisville Bagging Mfg. Co. v. Central Passenger Ry. Co.**—A similar decision was made about the same time in the Louisville law and equity court, at Louisville, Ky.² The company was incorporated in 1865. An act of the legislature was passed in 1871 authorizing the company and the city to alter any contract theretofore made in relation to the motive power to be used in propelling cars on its tracks. In 1884 the legislature amended the charter so as to grant the company the right to operate its cars by the cable system or electricity,

¹I am indebted to Mr. John A. Wise, counsel for the Edison General Electric Company, No. 44 Broadway, New York, for copies of the opinions in this and the two following cases. The first two have since been reported in 3 Am. El. Cases, 236, 273.

²Louisville Bagging Mfg. Co. v. Central Passenger Ry. Co., June 30, 1890, 3 Am. El. Cas. 236.

or such other power as might be approved by the general council of the city of Louisville. In 1886 an act was passed authorizing the company to build and operate lines on the streets and routes granted through its charter or by ordinance, such lines to be operated by any power now authorized in the charter as amended, and the council was empowered thereafter to grant "authority to build and operate lines on routes and on such terms and conditions" as might be agreed upon.

In 1888 the council granted the right to use the cable or electricity as a motor on any or all of its lines, and to erect all necessary structures and appliances therefor. It was held that there was no doubt the company had acquired legislative and municipal sanction of the use of electricity as a motive power, and that the erection of posts and the construction of the apparatus necessary for the safe application and use of electricity as a motive power was not a diversion of the street from its proper uses.

§ 19. *The same — Detroit City Ry. Co. v. Mills.*—In *Detroit City Ry. Co. v. Mills*, in the circuit court of Wayne county, Mich., the action was brought for cutting down a pole erected for an electric railway, and the defense was that the plaintiff had no right to put it up. The company was authorized by statute to propel its cars by steam or other power whenever the municipality should authorize the same. In January, 1889, it was empowered by a city ordinance to substitute for animal power such system of electric or other motive power, except steam, as should seem best. It was held by Reilly, J., that the electric railway did not constitute a new burden, and that it was within the power of the city council to authorize the use of poles and wires.

This decision was affirmed by the supreme court of Michigan, May 6, 1891.¹ And it was held that under this action of the legislature and the municipality, the railroad company had a right to use the overhead system for propelling street cars by electricity; and in this case, it will be observed, the poles and

¹ *Detroit City Ry. Co. v. Mills*, 85 Mich. 634. Two of the judges dissented, but only on the ground that street railways, especially if they use the overhead electric system, are a

new burden on the street, for which damages must be paid to abutting owners. For a fuller statement of the case, see §§ 131 and 138, ch. X, *infra*.

wires were not mentioned in the ordinance, but are only implied in the general permission to use electricity as a motive power.

§ 20. *The same*—*Pelton v. East Cleveland R. R. Co.*—In *Pelton v. East Cleveland R. R. Co.*¹ the company had constructed a street railway under a general ordinance of the city of Cleveland regulating the construction and running of passenger cars drawn by horses or mules. The road was built in 1859, and there was no statute at the time authorizing the construction of street railroads, but the company obtained the consent of the owners of the greater part of the adjoining property in pursuance of the ordinance. The statute pertaining to the subject was not passed until 1861. In 1879 the company obtained from the city a renewal of the franchise for twenty-five years, but did not ask for the consent of property owners. On July 13, 1888, the city council passed an ordinance granting the company “the right to erect and maintain wires and all necessary appliances for producing and conducting electricity as the motive power” on a certain part of its line, and this was extended by resolution on May 13, 1889, to the streets in question. On a bill for injunction by one hundred and twenty-five property owners, it was held that the change of motive power did not change the manner of use of the street, nor impose a new burden upon the land; that the provision requiring consent of property owners did not apply, and that the ordinance and resolution were valid. The decision of the common pleas was affirmed on appeal by the circuit court, Caldwell, J., reading the opinion of the court.²

§ 21. *The same*—*Cases in chancery in New Jersey.*—In *Halsey v. Rapid Transit Street Ry. Co.*, the question came before the court of chancery of New Jersey.³ The railroad com-

¹ *Pelton v. East Cleveland R. R. Co.*, Cuyahoga Com. Pleas, Ohio (July, 1889), 22 Week. Bull. 67, 3 Am. El. Cas. 215. See also *State of Ohio v. East Cleveland R. R. Co.*, 6 Ohio Circuit Court Rep. 318, 322, quoted in this opinion, in which it was held that the consent of property owners, having once been obtained for the construction of a horse railroad, was not

required on renewal of the franchise nor on the change of motive power to electricity. See, however, *St. Michael's Church v. Forty-second St. etc. Ry. Co.*, 57 N. Y. Supp. 881.

² See ch. X, § 129, *infra*.

³ 47 N. J. Eq. 380, 20 Atl. Rep. 859, 55 Am. & Eng. R. R. Cas. 76, 3 Am. El. Cas. 283, 15 N. J. Law Journal, 109, Dec. 6, 1890.

pany had been organized under a general act for the formation of street railway companies which prescribed no special motive power. There was also a later statute authorizing the use of electric motors with the consent of the common council, and this consent had been given by a resolution authorizing the erection of poles along the curb line of certain streets and along the middle line of the broader streets, prescribing the character of the poles and fixing the location of them.

Van Fleet, V. C., referring to the fact that the company was organized under a general statute for the formation of street railway companies which in no way specified or limited the kind of motive power to be used, said: "Hence, under the general grant of power to maintain and operate a street railway, it would seem to be clear that a corporation formed under this statute takes, by necessary and unavoidable implication, a right to use any force in the propulsion of its cars that may be fit and appropriate to that end, and which does not prevent that part of the public which desires to use the street according to other customary methods from having the free and safe use thereof."

Besides the act of incorporation, he said, there was another statute expressly authorizing the use of electricity as a motive power with the consent of the common council. The consent had been given by resolution, and a resolution was sufficient (no particular mode of giving the consent being specified). The resolution provided for supplying the electricity by means of the poles and wires, and in the present state of the art, as appears from the evidence, these constitute a part of the best, if not the only, means by which electricity can be successfully used for street-car propulsion; and, therefore, he held the defendants had a right to use the poles and wires to furnish the motive power for operating their road. He held, moreover, that they were used to facilitate public travel on the street in the cars, and did not impose a new burden on the land nor entitle the owner to compensation.

It is to be observed that in none of these cases was the use of poles and wires expressly authorized by the legislature, and in some of the cases it was not expressly mentioned in the municipal ordinance; but in all the cases it is held or assumed

that the authority to use the electric motor is sufficient authority for using these means of supplying electricity.

§ 22. **The same — Contrary decision in the New Jersey supreme court.**— The questions raised in the Halsey case came before the New Jersey supreme court in a suit on *certiorari* between the same parties, and it was decided that the common council had no power to grant the resolution authorizing the erection of the poles. No reference was made to the opinion of the vice-chancellor, nor to any of the cases in other states above cited. The decision was based upon the construction of the statute and upon the conclusion of the court upon the evidence as to what was implied in the term “electric motor.”¹

The court assumed it to be entirely settled that, without the authority of the statute, the city council had no power to permit the obstruction of the streets by the poles, even though the obstruction was incidental to the operation of a street railway. Referring to the evidence, they said that it appeared that cars operated by the storage battery had been in use for five years at the time of the passage of the statute, and that therefore the permission to use electric motors did not give, by implication, the right to use poles and wires.² The conclusion was that the common council had no power to authorize or consent to anything more than the use of an electric motor (operated by a storage battery within the car), and that the ordinance assuming, as it did, to vest in the company the right to place poles and string wires in the streets was a nullity.

The court distinguished between the electric railway operated by the overhead system and the horse railway as described by Chancellor Green in *Hinchman v. Paterson Ry. Co.*, above referred to,³ and said it was only because horse railways made no obstruction in the streets that they were considered in that case as being only a modification of the ordinary use of the

¹ It appeared in the case that the storage battery was used on only three or four cars in Europe before 1886, and that the first car was brought to this country in October of that year. There was also proof undisputed that five railroads in this country were operated by the trol-

ley system as early as the winter of 1885-86.

² *State, Green pros., v. Trenton, and State, Halsey pros., v. Newark*, 54 N. J. Law, 92, 102, 15 N. J. Law Journal, 34 and 45, with note stating the evidence and citing cases.

³ § 9; 17 N. J. Eq. 78.

streets for vehicles; but poles and wires the court held to be such obstructions as changed the character of the use of the street, and could only be permitted by the clearest expression of legislative intent. The court expressly said that its conclusion rested upon the intention of the legislature, as expressed in the act, and declined to express an opinion on the question whether the rights of the owners of abutting land were affected. This decision was followed in the supreme court in a case decided at the February term, 1894.¹

§ 23. **The same—Later cases in New Jersey.**—In a later case,² however, the supreme court decided that when the poles and wires are duly authorized by the legislature, the electric railway does not so change the character of the use of the street as to impose a new burden upon the land; but there has been no express reversal or modification of the opinion of that court that an ordinance permitting the use of poles and wires is not justified by a statute merely authorizing the use of electric motors, without specifying the overhead system of supplying electricity.

The matter is now settled by a statute which declares that municipal consent to the operation of a street railway by electric motors shall be deemed to include the use of poles and wires and other appliances.³

The court of chancery has approved and followed the decision of Vice-Chancellor Van Fleet in the Halsey case. It was followed by the chancellor in November, 1891, in an unreported case,⁴ and in 1893 the whole subject was thoroughly considered by Vice-Chancellor Green in *Paterson Ry. Co. v. Grundy*.⁵ The company was authorized by its charter granted in 1886 to use vehicles to be operated by such motive power as it might deem proper. In 1868 the municipality consented to laying rails in

¹ *Lewis v. Freeholders of Cumberland County*, 27 N. J. L. 416.

² *Kennelly v. Jersey City*, 57 N. J. Law, 293, 30 Atl. Rep. 531.

³ P. L. 1896, p. 329.

⁴ *Jersey City & Bergen St. Ry. Co. v. Jersey City*. An order was made restraining any interference with the construction of a line of poles and wires to which the consent

of the common council had been given under the act of 1886 above referred to. The chancellor allowed proofs to be produced to show that the mode of construction of this particular line was dangerous, but excluded all evidence directed against the use of the overhead system as such.

⁵ 51 N. J. Eq. 213, 26 Atl. Rep. 788.

the streets for a horse railroad, and the line was built and operated. Afterwards the act of 1886, above referred to, gave street railway companies permission to use electric motors with the consent of the common council. Consent was given by ordinance to the use of such motors with poles and electric wires. The vice-chancellor held that the charter of the company and the act of 1886 were sufficient to authorize the ordinance. He said the charter gave the right to use any motive power the company might deem expedient, and that this right was limited only by the controlling rule that the means adopted must not obstruct the public use of the street in the accustomed manner, and that the right of the company under the act of 1886 to use electric motors and the proper accessories thereto was settled, so far as this record was concerned, by the decision in *Halsey v. Rapid Transit St. Ry. Co.* The views of the vice-chancellor in that case, he said, were sustained in a large number of cases, and he referred to the authorities cited in this chapter and chapter X of this book.

§ 24. The same — Decision of the court of appeals of New York. — After the decision of the supreme court of New Jersey in *Green v. Trenton*,¹ the question came before the court of appeals of New York,² whether the right to use electric power by means of poles and wires was implied in the charter of a horse railroad company granted in 1862. The charter gave the company permission to use "the power of horses, animals or any mechanical or other power or the combination of them which the company may choose to employ, except the force of steam." The court said the choice of motive power was not limited expressly, except by the exclusion of steam, and was not limited impliedly except to exclude such as in its nature or mode of application would be a public nuisance or render the passage of the streets unsafe for travelers. The use of the single trolley system, the court said, was found by the referee not to be dangerous, nor in any degree a public nuisance. The act of 1862 could not be limited to such methods of operating street surface railroads in cities as had then been invented and were then in actual use. The language of the statute includes

¹ *Supra*, § 22.

N. Y. 393, 32 N. E. Rep. 148, 6 Am.

² *Hudson River Teleph. Co. v. Watervliet Turnpike & Ry. Co.*, 135 R. R. Corp. Rep. 619, 4 Am. El. Cas. 275.

undiscovered as well as existing modes of operation, and it must be presumed that general legislative enactments are mindful of the growth and increasing needs of society, and the general language of this statute must not be construed so as to confine the selection of the motive power to such as had then been discovered. It was held that the company was lawfully authorized to use the wires and the electric current, and that an injunction should not be issued against it in favor of a telephone company having wires in the same streets and alleging that its current was interfered with by the more powerful current used to propel the street cars. In a recent case in New York¹ it was held that on a change of motive power from horses to the underground electric current it could not be necessarily inferred that there could be a permanent obstruction of the street or an exclusive appropriation of a portion of it to other than customary street uses, and that that would depend upon the speed and frequency with which the cars were run; but that the legislative grant of the right to operate a street railroad by steam, animal or mechanical power in New York city did not authorize the owners of the franchise to change the motive power without the consent of the railroad commissioners or the property owners.

§ 25. **The same—Decisions in Maryland.**—The court of appeals of Maryland, in January, 1892, had before them "the question as to the power on the part of the city authorities to permit the use of electricity for propelling street cars." They said: "This question comes before us for the first time, but it has been fully considered by the highest courts of other states, and these courts, without a single exception, have held it to be a legitimate use for this purpose;"² and it was decided that since the statute (Act of 1870, ch. 370) conferred on the mayor and council full power to authorize the use of electricity, the plaintiff had no cause to complain of the electric railway as a new servitude on abutting land. The line was to be operated by the overhead trolley system, and it seems to have been assumed without discussion that under an act passed in 1870,

¹ *St. Michael's Church v. Forty-Second St. etc. Ry. Co.*, 57 N. Y. Supp. 881 (1899). Md. 222, 23 Atl. Rep. 463, 4 Am. El. Cas. 153, referring to Taggart's Case, Halsey's Case, Williams' Case and

² *Koch v. North Avenue Ry. Co.*, 75 Lockhart's Case, cited in ch. X.

giving the city power to authorize the use of electricity, it was competent for the city to grant permission to put up poles and wires; but the construction of an elevated road being forbidden by statute, it was held that such a structure could not be authorized by the municipality. This decision was followed by the same court in January, 1894,¹ and it was held that under the charter of a turnpike company, passed in 1890, giving the right to lay railroad tracks and to use "any motive power or system of traction," the company was authorized to use electricity, and to put up poles and wires for that purpose.

§ 26. **The same — Decisions in other states.**— The supreme court of Utah as early as April, 1891,² decided that, under a statute referring to steam and horse railroads, the right of eminent domain might be exercised on behalf of electric railways, and that, although a common council could not, without special legislative authority, permit a steam railway to be laid and operated in a city street, yet, by virtue of its general control over the streets, it could give permission for the operation of a street railway in such a manner as not to interfere with ordinary travel, and that such an ordinance referring to an electric railway, and permitting the use of poles and wires, was not invalid.

In a case in the Philadelphia court of common pleas,³ it was held that under a statute passed in 1889, authorizing the use of any motive power "other than locomotive," it was lawful for a company organized "to use and build a road to be operated by horse, cable, or electrical power," to construct the overhead system of poles and electric wires, with the consent of the municipal authorities. And in another case⁴ the same court said that this act, though loosely expressed, would be construed as including every present known power of locomotion except steam, and therefore would be taken to authorize the use of electricity.

But where the charter gave no power, either expressly or by implication, to put up poles and wires, it was held that the

¹ *Green v. City & Suburban Ry. Co.*, 78 Md. 294, 28 Atl. Rep. 626, 4 Am. El. Cas. 206.

² *Ogden City Ry. Co. v. Ogden City*, 7 Utah, 207, 26 Pac. Rep. 288, 3 Am. El. Cas. 321.

³ *Fox v. Catherine & B. St. Ry. Co.*, 1 Pa. Dist. Rep. 507, 4 Am. Elec. Cas. 158 (1892).

⁴ *Gillette v. Chester & M. Ry. Co.*, 2 Pa. Dist. Rep. 450, 4 Am. El. Cas. 160.

company cannot adopt this method even with municipal consent.¹

And in later cases the supreme court of Pennsylvania said it had not yet been decided by that court "whether a passenger railway incorporated with authority to use only horse power for the traction of its cars can be converted into an electric railway company by the action of the municipal authorities," and also that it was clear that a company chartered since the present constitution (1874) could not, of its own authority, make any change of its motive power which would increase the servitude upon the street without the municipal consent.

But it was held that a statute authorizing the municipality to provide for a change of motive power is not local or special, because this subject is one within the province of municipal legislation. It refers to the regulation and not the authorization of street railroads.²

In Georgia, where a company was authorized by its charter to construct a line between two cities, and along or upon any streets or highways which the railroad should intersect or touch, it was held that with the consent of the city of Macon (which possessed the ordinary municipal powers over streets) the company had the right to construct its main line longitudinally on the streets of the city for the use of electric cars for the carriage of passengers.³ The court said: "The operation of the line by steam, in the streets of the city, might require more explicit legislative authority, but common experience and every-day observation show beyond question that there is a wide difference between trains of cars drawn by locomotives, of which steam is the motive power, and the ordinary electric passenger car, which is now in common use throughout the length and breadth of the land. In the one instance the street may very properly be said to be burdened with an additional

¹ *Watkins v. West Phila. Pass. Ry. Co.*, 1 Pa. Dist. Rep. 463; *Haines v. Twenty-Second St. & A. Ave. Pass. Ry. Co.*, 1 Pa. Dist. Rep. 506, 4 Am. El. Cas. 42.

also *Farrell v. Winchester Ave. R. Co.*, 61 Conn. 127, 23 Atl. Rep. 757, 3 Am. El. Cas. 85; *Powell v. Macon & I. S. R. Co.*, 92 Ga. 209, 17 S. E. Rep. 1027 (1893).

² *Reeves v. Phila. Traction Co.*, 152 Pa. St. 153; *Fritz v. Erie Pass. Ry. Co.*, 155 Pa. St. 472; *Potter v. Scranton Traction Co.*, 176 Pa. St. 271-278. See

³ *Powell v. Macon & Indiana Springs R. R. Co.*, 92 Ga. 209, 17 S. E. Rep. 1027, 4 Am. El. Cas. 44 (1893).

servitude entirely inconsistent with the free use of the same by the public; in the other this reasoning, in the light of experience, would not aptly apply.”¹

§ 27. Conclusions with respect to the electric railway.—

In view of this general concurrence of judicial opinion, it may be said that it is now well settled that when the legislature has authorized the use of the streets of a city for street railways, to be operated by electric motors, the city authorities have power to give permission to set up poles and wires for the purpose of supplying the electric current; and even though electricity is not expressly mentioned, yet if the power conferred by the legislature is broad enough to include this kind of motive power, then the city, under its general authority to regulate the use of the streets, has power to give permission to put up poles and wires reasonably necessary for the operation of the street cars by electricity. The electric railway being operated for the same purposes as a horse railway, and subject to the same conditions with respect to the use of the streets by vehicles in general, makes a legitimate use of the streets, and if the operation of such a railway is authorized by the legislature, the municipality under its ordinary powers may grant permission to set up the necessary poles and wires.

§ 28. Power of municipality to authorize telegraph and telephone lines.—Legislative sanction, either given directly or mediately conferred through proper municipal action, is, of course, necessary to authorize the use of the streets for the poles and wires of a telegraph or telephone company;² but the question remains whether, under the powers generally conferred upon city governments, they have authority to grant permission to set up telegraph and telephone lines in the streets. Whether this comes within the power to regulate streets de-

¹ The supreme court of the United States in *City Ry. Co. v. Citizens' R. R. Co.*, 166 U. S. 557, held that a change of motive power from horse-power to electricity was ratified by a subsequent statute, even if it was not within the power of the municipality to authorize it without such a statute; and the supreme court of Pennsylvania in *Potter v. Scranton*

Traction Co., 176 Pa. St. 271, 35 Atl. Rep. 188, held that the consent of a borough would be presumed in an action for personal injuries in an accident occurring five years after the change of motive power was made.

² *Dill. Mun. Corp.* (4th ed.), § 698; *East Tennessee Tel. Co. v. Russellville*. 51 S. W. Rep. 308 (Ky., 1899). See also § 24 of the present chapter.

pendes a good deal on whether the use of the streets for telegraph and telephone purposes is a proper street use or not, and this question will be discussed in the chapter on the Rights of Abutting Owners with respect to the telegraph and telephone.¹ It has been held in many states that these lines are a new use of the streets, and impose an additional burden on the land, and if this is so it would require special legislative sanction to justify their construction. In New Jersey, where the consent of the land-owner to the erection of the poles is required by statute, it has been held that a city having liberal charter powers has not authority to grant a telephone company the right to erect and maintain a line of poles and wires in the streets.² Magie, J., said the legislature, representing the public, may restrict the public use by granting a right to erect poles and other obstructions in the streets, and may delegate such authority to municipalities; "but such grant of power must plainly appear either by express grant or by necessary implication."

In a case in Missouri,³ where the telegraph is held to be a proper use of the street, large powers had been granted to the city of St. Louis, and no question was made as to its power to grant the right to construct the line of telegraph. The court said that the power of the city of St. Louis to regulate streets extends to new uses as they spring into existence from time to time, as well as to old ones in use at the time of the grant of the power, and that the telephone was one of such uses. One of the purposes of a street, the court said, was to facilitate communication between the people, and the telephone served this purpose while it actually relieved the streets of the passage of men and vehicles. The construction of the line had, however, in fact been authorized by statute as well as by ordi-

¹ Chapter VIII. And see also chapters IX and X.

² State, Domestic Teleg. & Teleph. Co. v. Newark, 49 N. J. L. 344 (1887), 2 Am. & El. Cas. 141.

³ St. Louis v. Bell Teleph. Co., 96 Mo. 623; Julia Building Ass'n v. Bell Teleph. Co., 88 Mo. 258, 1 Am. El. Cas. 801. See Rights of Abutting

Owners, Telegraphs and Telephones, *infra*, chapter VIII.

As to the necessity for legislative authority for using the streets or highways for telegraph or telephone poles, see also Commonwealth v. Boston, 97 Mass. 555; Regina v. United Kingdom Elec. Teleg. Co., 9 Cox Cr. Cas. 173-180; Young v. Yarmouth, 9 Gray, 336.

nance. This decision was cited with approval by the supreme court of Montana in May, 1892,¹ and that court said: "We think the use of the street in a reasonable manner and to a reasonable extent, for this purpose, is within the uses to which the street may lawfully be put, when such use is sanctioned by the public through its duly authorized municipal agents;" and it was held that under a charter authorizing the council to license, tax and regulate telephone companies, the city had power to give permission to such a company to string wires and set poles in the streets.

These decisions relate especially to privileges conferred on companies constructing lines for business purposes, but the telephone and telegraph are both used for municipal purposes in aid of the fire and police departments, just as electric-light wires are used for public lighting; and it would seem that a city having full police powers would have implied authority to set up telegraph poles for such purposes, as well as to place fire-plugs and lamp-posts in the streets.²

§ 29. Power of the municipality to authorize poles and wires for electric lighting.—Power to light the streets and public places is one of the ordinary powers given to municipalities of every kind, and this power involves as a matter of course the right to set up in the streets such lamp posts as may be found convenient for the purpose, and the right of the municipality to authorize the laying of gas pipes in the streets and the erection of lamp posts for the purpose of lighting them has never been questioned;³ and when electricity was to be substituted for gas, it was rarely that any question was made as to the right to set up an electric-light pole instead of a lamp post for the gas light, nor the right to string the wires instead of laying a gas pipe. There is no difference in principle between the two cases. The electric light may require some poles merely to carry the wires and not for the light itself, and the

¹Hersfield v. Rocky Mountain Bell Tel. Co., 12 Mont. 102, 29 Pac. Rep. 883, 39 Am. & Eng. Corp. Cas. 532, with note, 4 Am. El. Cas. 73.

²For cases on this and analogous questions, see §§ 26-28, and also chapter IX.

³Lewis' Em. Dom., § 129; 2 Dill

Mun. Corp., 4th ed., § 691, note. For cases with regard to gas pipes in streets, see Regina v. Sheffield Gas Co., 22 Eng. Law & Eq. 518; Galbreath v. Armour, 4 Bell App. Cas. 394, and other cases cited *infra*, ch. IX, § 108, note.

wires may be overhead instead of underground; but there can be no question that a city, or even a village, having power to provide for the lighting of its streets, has the implied power to set up poles and string or lay wires in its streets for the purpose of lighting those streets by means of electricity.

The only question arises when the lines are to be used not merely for public purposes, but also for the purpose of supplying private buildings with light. They are usually put up for this purpose and are operated by private companies for their own profit, and it has been questioned whether such franchise may be granted without express legislative authority, and whether the fact that the poles and wires were used for private purposes rendered them illegal in the absence of legislative authority.

§ 30. *The same* — *Cases*. — The powers of village trustees are not as great as those of a city corporation, and it has been held in New York that the trustees of a village have power to authorize the erection of poles for lighting the streets and public places by electricity, even if not for lighting private buildings; but that the fact that a pole is used for private purposes also does not justify the removal of it.¹

And in a later case, the supreme court, referring to this, was inclined to admit the power of the municipal authorities to authorize the use of poles and wires for lighting all private houses which should require the light. The court said the owner of the soil might have a right to compensation, but it did not follow that he had any other right, and an injunction against his cutting down the poles was allowed, although the poles were part of a system intended for lighting an adjoining village.²

In another case, however, the superior court of New York made a distinction between the use of poles for the purpose of lighting the streets and the use of them for the purpose of lighting private dwellings; and where the company's charter gave it the power to furnish electric light for both purposes, the court held that it must show that the pole in question (objected to by an abutting owner) was necessary or highly con-

¹Johnson v. Thomson-Houston Electric Co., 54 Hun, 469, 7 N. Y. Supp. 716, 3 Am. El. Cas. 203 (1889). See also Elliott on Roads, 525.

²Electric Construction Co. v. Hef-
ernan (Sup. Ct.), 12 N. Y. Supp. 336,
58 Hun, 605 (1890), 3 Am. El. Cas. 207.

venient for the public as well as the private uses, or else the injunction granted would be allowed to stand.¹

In Missouri, where special powers are given to the city of St. Louis, it was held, in 1891, that under the power to regulate the use of streets that city had authority to permit wires to be strung in the streets for the general purposes of an electric lighting company;² and this decision was followed in Illinois in a case of a village having authority under its charter "to regulate the streets."³ In another case in Illinois municipal authority alone was held not sufficient to justify a company in transmitting electric light power over the wires of another company beyond the limits fixed in the charter or legislative grant of the former company.⁴

§ 31. The same — Cases in Iowa. — In a recent case in the United States circuit court in Iowa,⁵ it became necessary to decide the question whether, by virtue of a general grant of power to light the streets, cities had authority in Iowa to grant franchises to use the streets for gas pipes or electric-light wires for the purpose of lighting public and private places. Such franchises had been granted and acted on with respect to gas pipes, and the question of their legality arose in a case relating to an electric-light franchise. The only express legislative power that had been given was that contained in section 464 of the code: "They (cities) shall have power to lay off, open, . . . establish and light streets, alleys, public grounds, wharves, landing and market places," and the general power conferred in section 482 to make ordinances for carrying into

¹ *Tiffany v. United States Illuminating Co.*, 51 N. Y. Super. Ct. 280 (1885), 1 Am. El. Cas. 629.

Now the Transportation Corporations Law of New York, sections 60, 61, authorizes cities, villages and towns to grant to electric light companies the right to erect poles and wires in the streets for furnishing light, heat and power to private houses as well as public buildings, and this has been held to be not against public policy, since all abutting owners share in the benefit of the improvement which imposes the burden upon the streets. *Palmer v. Larchmont Elec-*

tric Co., 158 N. Y. 237, 52 N. E. Rep. 1092, reversing 39 N. Y. Supp. 523, 6 App. Div. 12.

² *West. Union Tel. Co. v. Guernsey & Scudder El. Light Co.*, 46 Mo. App. 135, 3 Am. El. Cas. 425.

³ *Dickson v. Kewanee El. Light Co.*, 53 Ill. App. 379 (1893).

⁴ *Chicago v. Mut. Elec. L. & P. Co.*, 55 Ill. App. 429. See also *Jacksonville Electric Light Co. v. Jacksonville*, 36 Fla. 229.

⁵ *Levis v. Newton (C. C. S. D. Iowa)*, 75 Fed. Rep. 884, 6 Am. El. Cas. 13 (1896).

effect the powers and duties conferred upon them, "and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporation and the inhabitants thereof." The court said that it had been decided in many well-considered cases¹ that the power granted to a city to light its streets not only authorizes the city itself to furnish the lighting, but also empowers it to contract with others to do so; and it was decided that in view of the legislative and judicial acquiescence in the practice long established in Iowa, by which such franchises had been granted to gas companies and acted upon, the court would not grant a preliminary injunction against the erection of poles for electric lighting, even though the ordinance contained provisions that might be void as granting a perpetual franchise.

The ordinance did not expressly purport to grant the use of the plant for lighting the public streets, and on this objection being urged the court said: "While the cases are not uniform in their holdings, the great weight of authority seems to sustain the position that the furnishing of light to citizens generally is a sufficient public use to sustain the right to use the streets for the operation of the plant furnishing such light;" and it was held that even if this were not so, and though the lighting of the streets was already provided for, this court would assume that this ordinance was intended to include the public purpose necessary to make it a valid act of the municipality.

Where municipalities were given by the legislature general power to light the streets and to erect or authorize the erection of the necessary plant for electric lighting, and this authority was accompanied by a proviso that no such works should be erected without the approval of a majority of the voters at an election, it was held in several cases in Iowa that, without such approval, an ordinance granting a company a franchise to use the streets for poles and wires for electric lighting for general public and private uses was void.²

¹ *Garrison v. Chicago*, 7 Biss. 480, 1007; *Le Claire v. Davenport*, 13 Iowa, 210; *Davenport v. Kelley*, 7 Iowa, 102. *Fed. Cas. No. 5255*; *Newport v. Newport Light Co.*, 84 Ky. 177; *Spencer v. Andrew*, 82 Iowa, 14, 47 N. W. Rep.

² *Hanson v. Wm. A. Hunter Electric Light Co.*, 86 Iowa, 722, 48 N. W. Rep.

§ 32. Power of municipality to erect its own electric lighting plant.—The power of municipalities to erect electric light plants of their own has been discussed a good deal in recent cases. It involves the question of the use of the streets for electric wires, but it depends upon the local statutes; and a discussion of principles involved belongs to the topic of municipal corporations, and we will only give references to some of the later cases.¹

§ 33. Governing principle in all these cases.—With respect to the use of the street for electric wires of every kind, the governing principle would seem to be, that municipal corporations cannot grant exclusive privileges, cannot divert the street from its proper uses as a street, and cannot take private property, whether incorporeal or tangible; but they have the power to regulate the use of the streets, and to determine in the first instance, at least, whether or not anything is an obstruction to the public use of the street. There are many purposes of a public nature for which streets have been employed by custom, which are in no way connected with public travel. They have been used for sewers, gas pipes and water pipes. They have been incumbered with lamp posts, awnings, and hitching posts. They are convenient avenues for distributing water, light, heat, power and other things of general necessity or convenience.² If, therefore, the use of electric wires, whether over the street or underground, for any particular purpose, does serve a purpose for which streets are ordinarily used, does not involve

1005 (1891), 53 N. W. Rep. 84 (1892); *Keokuk v. Ft. Wayne Electric Co.*, 90 Iowa, 67, 57 N. W. Rep. 689 (1894).

¹*Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. Rep. 849 (1891); *Opinion of the Justices*, 150 Mass. 592; *Spaulding v. Peabody*, 153 Mass. 149, 26 N. E. Rep. 421 (1891); *Maudlin v. Greenville*, 33 S. C. 1, 11 S. E. Rep. 434 (1890); *Thomson-Houston Electric Light Co. v. Newton* (U. S. C. C. Iowa), 42 Fed. Rep. 723, 3 Am. El. Cas. 507 (1890); *Howell v. Millville*, 60 N. J. L. 95, 36 Atl. Rep. 691; *Levis v. Newton*, 75 Fed. Rep. 884, 82 Fed. Rep. 1006; *Gallagher v. Olyphant* (Pa. Sup. Ct., 1897), 37 Atl. Rep. 258; *Mitchell*

v. Negaunee, 113 Mich. 359, 71 N. W. Rep. 646; *Sheffield Corp. v. Sheffield Electric Light Co.* (1893), 1 Ch. 203; *Jacksonville Electric Light Co. v. Jacksonville*, 36 Fla. 229, 18 S. Rep. 677; *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. Rep. 885; *Halifax v. Lordly*, 20 Can. Sup. Ct. Rep. 505; *Mayo v. Washington*, 122 N. C. 5, 29 S. E. Rep. 343; *Reno Water, Land & Light Co. v. Osborn*, 56 Pac. Rep. 945 (Nev., 1899).

²See, however, a discussion of the "Legitimate Uses of Streets, Railroads and Electric Wires," by John Lewis, 6 Am. R. R. & Corp. Rep. 299.

an exclusive franchise, and does not affect private rights in the adjoining lands, and does not obstruct public travel, in any such case it would seem that a municipal corporation might, under its implied powers, give authority to use the street for electric wires.

§ 34. **The paramount authority is in the legislature.**—The subject, however, belongs, as I have said, more especially to the law of municipal corporations and municipal franchises; and without discussing it any further, I wish only to emphasize the fact that the power over the streets belongs to the legislature and not to the municipality. The legislature alone has the power to divert them from their ordinary uses, or to limit or extend the uses to which they may be put. The streets, as Judge Dillon says, “do not belong to the city or town within which they are situated, even although acquired by the exercise of eminent domain and the damages paid out of the corporation treasury. The authority of municipalities over streets, they derive, as they derive all their other powers, from the legislature—from charter or statute.”¹

It is also important to bear in mind that, so far as the rights of the public are concerned, the power of the legislature over the streets is absolute. Subject only to making compensation for injury to private property,—that is, to land or to rights in or relating to land,—the legislature, representing the public, has absolute power to dispose of the public rights in the streets.² It may release the public rights either wholly or partially; it may vacate the street entirely, or authorize it to be used wholly or partially for a railroad or telegraph or any other purpose. It is only with respect to the private rights of owners of land along the street that any question can arise with regard to the authority of the legislature, or the municipality duly authorized by the legislature, to change the uses of a street or divert any part of it from the purposes of public travel to any other purpose. All these questions with regard to the diversion of

¹ 2 Dill. Mun. Corp. (4th ed.). § 683, citing cases; Pennsylvania R. R. Co.'s Appeal, 115 Pa. St. 514; Case of the Phila. & Trenton R. R. Co., 6 Whart. (Pa.) 25.

² *Ibid.*; Dill on Mun. Corp., § 657;

Domestic Teleg. & Teleph. Co. v. Newark, 49 N. J. L. 344-346. It may grant the right to construct a street railway in a street without the consent of the municipality. Chicago v. Illinois Steel Co., 66 Ill. App. 561.

the streets from their ordinary uses will be considered in dealing with the rights of the owners of abutting lands, and with the question whether electric wires of various kinds may be put up in the streets without making compensation.¹

§ 35. Authority of some kind is required for special uses of the street, even though they are proper street uses.— It has been argued that if the use of the wires or rails or any such exclusive use is a proper use of the highway, no authority of any kind is required, because the highway is open to any one who wishes to use it as a highway; and hence it is insisted that, if legislative authority is required for any particular use of the highway, this is enough to prove that it is not a proper use of the highway, but a new use, for which compensation must be made to the abutting owner.² It may well be, however, that the legislature has a right to distribute the space³ occupied by

¹ *Infra*, chs. VIII, IX, X. Abutting Owners — Telegraph and Telephone, Electric Light, Electric Railway, etc.

² Lewis' Em. Dom., §§ 111, 124.

³ *People v. Squire*, 107 N. Y. 593, quoted below, ch. VI, § 6. In *Loneragan v. Lafayette St. Ry. Co.*, circuit court at Lafayette, Ind., July 9, 1899, Langdon, J., says: "The use of a street has been, as public needs have required, subdivided, and particular portions of public use have been restricted to certain defined limits in the street, as the sidewalks are devoted to foot passengers, and the intermediate spaces to animals, vehicles, and other uses. The greater and more complex the uses become, the inconvenience to former uses becomes greater and more defined. It is not, then, every inconvenience, impairment or curtailment of the customary accommodations or enjoyments of the general public, or the abutter, that will suffice to constitute a legally appreciable deprivation of a right of either. To determine whether a use of a street is without the original public easement, it is quite plain that the inconvenience complained of must be

tantamount to a substantial impairment of the public use; in other words, that the use of the street is destroyed or converted into a new use, subversive of its original purpose."

For a detailed statement of the laws of all the states with respect to franchises for the use of the streets, see *Economic Legislation of All States Relating to Incorporated Companies Operating Under Municipal Franchises*, by Allen R. Foote, and edited by Charles E. Everett (Robert Clarke & Co., Cincinnati, 1893). The account of the statutes and decisions of each state was prepared by an attorney in that state, and, having myself had a hand in preparing the New Jersey section, I know that it is too much to attempt to discuss the statutes of all the states in the present book on Electric Wires. See also *American Corporation Legal Manual* for the current year, edited by Charles L. Borgmeyer, and published at Plainfield, New Jersey.

In Great Britain the use of the streets for electric lighting, for telegraph and telephone lines and for street railways is carefully regulated

a street, and appropriate the several parts to various uses, and yet that individuals could not do this without legislative sanction. If there are various public uses to which streets are ordinarily put, the public authorities may provide for them all, some to be exercised in one part and some in another, so that altogether they shall serve all the purposes for which the street is required; and yet, without this provision, no person would have the right to reserve to one special use any part of the space devoted to the general use of a street.

However this may be, and whatever the effect of the decision upon the question of compensation to adjoining owners, it appears to be well settled that no franchise or privilege for any special use of the streets can be obtained without the permission of the public authorities; and there are no cases in which it is held that poles and wires for the telegraph, the electric light or the electric railway may be set up in the streets without authority of some kind.

by statute. No person or corporation is permitted to use the streets for such purposes without authority, and the authority is conferred by license, by provisional order confirmed by parliament or by special act. Consent of the local authorities is usually required and rules and regulations are made by the board of trade. Street railways are constructed under the Tramways Act, 1870. Electric lighting is governed by the Electric Lighting Acts, 1882 and 1888. The use of the streets for telegraph lines (formerly operated

by companies, but now by the postmaster-general) is regulated by the Telegraph Acts of 1863, 1878, 1885, 1892. Some account of these statutes and the decisions thereon may be found in the *Encyclopedia of the Laws of England*, sub-title *Electric Lighting, Telegraphs, Tramways*. The acts themselves are collected in Chitty's *English Statutes* (ed. 1894), vols. 4 and 12. The most recent books on the Electric Lighting Acts are Cunynghame, 1883; Bower & Webb, 1890; and Will, 1898.

CHAPTER III.

MUNICIPAL CONTROL.

CONSENT OF LOCAL AUTHORITIES — CONDITIONS AND REGULATIONS.

§ 36. Grants are usually made subject to consent or control of local authorities.— The legislature has, as I have said, the power to grant to individuals or corporations the right to special privileges with respect to the use of the streets, limiting or modifying the general public use. Such privileges are only granted for public uses, and in many of the states they can be conferred only by general laws upon those who comply with the conditions prescribed.

The statutes granting such privileges usually make them subject to the consent, or at least to the supervision, of the local authorities. In some states there are boards of commissioners to whom such matters are referred; in others, the question of the propriety of allowing certain franchises is referred to the probate court, which hears evidence and decides to a certain extent judicially.¹ More commonly, the regula-

¹ In Ohio, for example (Bates' Rev. Stat. 1897, § 3461), it is provided that the mode of use of streets shall be such as shall be agreed upon between the municipal authorities and the telegraph company, and that if they cannot agree, and if they unreasonably delay to enter upon an agreement made, the judge of the probate court of the county shall direct in what mode the telegraph line shall be constructed along the line of the street. In the same state the county commissioners are to appoint appraisers of damages of persons over whose lands telegraph lines shall pass or be erected. Act of February 8, 1847, Rev. Stat. 1897, §§ 3461-62. With regard to lines for electric light, heat and power, it is declared that they

shall not be placed in the streets without the consent of the municipality. Bates' Rev. Stat. 1897, § 3471a. In Connecticut, the selectmen of any town, the common council of any city, and the warden and burgesses of any borough are given full direction and control over the placing, erection and maintenance of electric wires and fixtures (Gen. Stat., § 3946); and no company using electric wires may exercise any of the powers conferred upon it to erect wires and fixtures over or under any public highway without the consent of the adjoining proprietors, or, in case such consent cannot be obtained, without the consent, in writing, of two of the county commissioners after hearing and notice. Gen. Stat., § 3945.

tion of the matter is delegated to a greater or less extent to the municipality where the streets are located.

With the increase in the use of electric wires, special provisions have been made for the regulation of the setting up and maintaining wires in the streets for various purposes. The statutes authorizing the construction of telegraphs provided in many cases for the designation of the streets by the common councils of the towns through which the line passed. Special officers are usually appointed to supervise the putting up of electric-light wires, and boards of electrical control have been constituted in some large cities, with extensive powers over all electric wires.

It is very common for the legislature to make the right to use the street conditional upon obtaining the consent of a certain proportion of the property owners; and other conditions are imposed either by the legislature or by the local authorities.

The question, therefore, how the privilege of using the streets for lines of electric wire may be obtained, involves a discussion of the power of the local authorities to withhold their consent,

In Illinois, the consent of the town or county authorities is required. Hurd's Rev. Stat. 1898, ch. 134. In Massachusetts, the location of the posts is to be specified in writing by the mayor and aldermen. Pub. Stat., ch. 109, § 2. See also *Ibid*, ch. 27, as to the powers of the selectmen, etc. So also in New Jersey, telegraph and telephone companies are authorized to use the highways for the purpose of erecting poles on obtaining the consent in writing of the owners of the soil, and they are required to apply to the legislative body of any municipality through which they may pass for a designation of the streets to be used and the location of the poles. Gen. Stat., p. 3458. Provision is made for application to the circuit court in case the owners will not consent, or the town authorities will not designate the streets. Rev. Stat., pp. 3459-60.

For a collection of the statutes of

the various states relating to telegraphs and telephones, see *Telegraph Laws of the United States*, 1 volume, New York, 1880; *Telegraph Laws of the American States and Canada*, 1 volume, New York, 1884, and addendum 1884 (prepared for the use of the Baltimore & Ohio Telegraph Co.); *American Statutes Relating to Telephones Collected*; series of articles in *American Law Register* (N. S.), vol. 20, by J. B. Uhle. Scott & Jarnagin on *Telegraphs*, published in 1868, contains an appendix of statutes in force at that time. See also a number of statutes quoted in *Thompson on Electricity*, ch. 3, art. 2. For a careful statement of the laws of all the states in regard to municipal consent to electric wires in the streets, see *Economic Legislation*, by A. R. Foote, with the laws of the several states, edited by Charles E. Everett: Robert Clarke & Co., Cincinnati, 1893.

and what conditions they may impose either as the price of their consent or by way of regulating the use of the streets.

§ 37. Power of municipality to withhold consent and impose conditions.—The authority to use the streets comes from the legislature, but the legislature may delegate to the local authorities the right to say upon what conditions the power may be used, or it may give only the right to determine the manner of the use. In the former case, there is a distinct delegation of legislative authority to grant the franchise; in the latter, there is only a grant of the power to regulate, but not to withhold the franchise.

If the legislative grant is made conditional upon the municipal consent, so that the statute amounts to a distinct delegation of authority to determine whether the line shall be constructed or not, it is probably true that no authority can be obtained without this consent, no matter for what reason it may be withheld; although there are decisions which suggest that this is in effect legislation, and that it is very doubtful whether the legislative department can delegate to any other authority the power to grant such a franchise.¹

It has been held that, where the right is given upon obtaining the consent of the municipality, the latter is not limited to giving or refusing consent, but may annex conditions as the price of its consent;² but there are cases in which it is held that

¹ *People's R. R. Co. v. Memphis R. R. Co.*, 10 Wall. 38-50 (1869), per Clifford, J.

² The legislature may delegate to the municipality the right to say how and upon what conditions the public streets may be used. 2 Dill. Mun. Corp. (4th ed.), § 708.

It has been held that the consent may be given upon condition, *e. g.*, that a station shall be built, or that the street shall be paved (2 Dill. Mun. Corp. (4th ed., § 706), and cases cited; *Jersey City & B. R. R. Co. v. J. C. & H. R. R. Co.*, 20 N. J. Eq. 61, 360), or that a street shall be graded and a crossing built (*Ind. & Cin. R. R. Co. v. Lawrenceburgh*, 34 Ind. 304); that a steam locomotive shall not be used

(*Richmond F. & P. Ry. Co. v. Richmond*, 96 U. S. 521; *Detroit v. Detroit R. R. Co.*, 43 N. W. Rep. 447), or that a tax shall be paid on the dividends and that the rate of fare shall be limited (*Alleghany v. Millville E. & S. St. Ry. Co.*, 159 Pa. St. 411, 28 Atl. Rep. 202); but the municipality cannot by withholding consent destroy a franchise granted by the legislature (*Jersey City & Bergen R. R. Co. v. Jersey City & Hoboken R. R. Co.*, 20 N. J. Eq. 61; *Jersey City v. J. C. & B. R. R. Co.*, 20 N. J. Eq. 360; *Paterson & Passaic H. R. Co. v. Paterson*, 24 N. J. Eq. 158; *Am. Union Teleg. Co. v. Harrison (Town of)*, 31 N. J. Eq. 628, 1 Am. El. Cas. 291; *Atlantic City Water-works Co. v. Consumers Water*

the consent cannot be withheld arbitrarily, but that it is the exercise of the police power, and must be exercised in a reasonable manner and so as not wholly to defeat the grant.¹ The powers of municipalities in such cases are discussed in the standard text-books on municipal corporations.² I need only refer to the cases relating to electric wires.

Where the legislative grant is definite, and authority is given to use the streets for a public purpose upon certain conditions, it is not lawful for the local authorities to impose other conditions which would impair or defeat the franchise.³

§ 38. **The same — Municipal consent as a condition precedent.**— Where a statute giving the privilege of placing electric wires in the highways clearly provides that the privilege is granted upon condition that the consent of the local authorities be obtained, then this consent is regarded as a condition precedent to the exercise of the franchise.⁴

It was so held in New York in 1890⁵ in the case of an electric

Co., 44 N. J. Eq. 427-432; but see *Franklin v. Nutley Water Co.*, 53 N. J. Eq. 601; *Saddle River v. Garfield Water Co.*, 18 N. J. Law Jour. 334.

¹ Even though the consent of the city be required as a condition precedent, the courts have power to review the decision to prevent oppression and fraud. *St. Louis Ry. Co. v. Southern Ry. Co. (Mo.)*, 16 S. W. Rep. 960-962 (1891). See also *Saddle River Township v. Garfield Water Co.*, 18 N. J. Law Jour. 334 (1895), where a preliminary injunction was denied to a township which appeared to be withholding its consent for the purpose of requiring compensation.

² Dill. Mun. Corp. (4th ed.), §§ 705, 706, 719, and notes.

³ *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32, 1 Am. El. Cas. 687 (1884); *Electric Ry. Co. v. Grand Rapids*, 84 Mich. 257, 3 Am. El. Cas. 67 (1890); *Summit Township v. New York & N. J. Teleph. Co.*, 57 N. J. Eq. —, 41 Atl. Rep. 46; *Bell Teleph. Co. v. Flad*, 23 Mo. App. 185, 2 Am. El. Cas. 128; *Hannibal v. Missouri & Kan. Teleph. Co.*, 31 Mo. App. 23, 2 Am. El. Cas. 146;

Meridian v. Western Union Teleg. Co., 72 Miss. 910, 5 Am. El. Cas. 56 (1895); *St. Louis v. Western Union Teleg. Co.*, 63 Fed. Rep. 68, 5 Am. El. Cas. 43 (1894).

⁴ A horse railway prohibited by statute from using any railroad, turnpike or artificial road without the consent of the parties owning the same cannot lay its rails on the paved streets of Philadelphia without the consent of the common council. *Commonwealth v. Central Pass. Ry. Co.*, 52 Pa. St. 506. See also *Hunt v. Chicago Horse & Dummy R. Co.*, 121 Ill. 638, where the right to use the streets for a steam railroad was given only on petition of the owners of one-half the frontage of the adjoining land. And in Illinois it is held that a city is without power to grant the use of a public street for railroad purposes, except upon the petition of property owners as prescribed by statute. *North Chicago St. Ry. Co. v. Cheetham*, 58 Ill. App. 318, Gray, J., dissenting.

⁵ In re *Rochester Electric Ry. Co.*, 123 N. Y. 351, 25 N. E. Rep. 381.

railway under chapter 254, section 3, of the laws of 1884. The court said that until such consents were obtained the right of the corporation to exercise its franchise was still inchoate, and that it had no power to take proceedings for the condemnation of the rights of land-owners. A similar decision was made in New Jersey with regard to the right of a water company to use the streets for its water pipes.¹ The court said the legislature had expressly made the consent of the municipality a condition precedent to the exercise of the power to use the public streets, and it was held that the township was entitled to an injunction. And in the court of errors in New Jersey² it was held that a court of equity would decide on the validity of consents given under the statute providing for the formation of traction companies,³ and that if the consent were invalid an injunction would be granted against the construction of the line of street railway. A subsequent act declared that no corporation created under the act should enter upon any highway for the construction of new lines of railway without the consent of the body having control of the highways; and the chancellor held in a later case⁴ that this was a condition precedent to the right to use the highway, and was applicable to a street railway company which had acquired the right recognized by the statute to construct and operate its line upon a turnpike, and a bill for an injunction at the suit of the attorney-general was sustained.

In New York, where the railroad law (section 91 as amended by chapter 545 of the laws of 1895) forbids the extension or

¹ *Franklin Township v. Nutley Water Co.*, 53 N. J. Eq. 601, 32 Atl. Rep. 381.

² *West Jersey Traction Co. v. Camden Horse R. R. Co.*, 53 N. J. Eq. 163, 5 Am. El. Cas. 137. See also *Stockton v. North Jersey St. Ry. Co.*, 54 N. J. Eq. 263.

³ *Laws N. J.* 1893, p. 342.

⁴ *Stockton v. Atlantic Highlands, etc. Ry. Co.*, 53 N. J. Eq. 418 (1895). See also *Trenton v. Trenton Pass. Ry. Co.*, 27 Atl. Rep. 483 (1893); *Grey v. N. Y. & Phila. Traction Co.*, 56 N. J. Eq. 463, 40 Atl. Rep. 21 (1898); *Meyers v. Hudson County Electric*

Co., 62 N. J. Law, —, 37 Atl. Rep. 618 (1898); *Beeson v. Chicago*, 75 Fed. Rep. 880; *Tamaqua & L. St. Ry. Co. v. Intercounty St. Ry. Co.*, 31 Atl. Rep. 473 (Pa. Sup. Ct.).

When the right to construct the line is made conditional upon obtaining the consent of the owners of a certain proportion of the land fronting on the street, the right to build the line is not acquired until this consent is obtained. *St. Michael's Church v. Forty-second St. etc. Ry. Co.*, 57 N. Y. Supp. 881, 26 Misc. Rep. (N. Y.) 601 (1899). See ch. XL

operation of a street surface railway without the consent of the local authorities, it was held that, before such a railway company can acquire the right to operate its line through any of the streets of a city, it must procure the consent of the local authorities;¹ and in another case it was held that a city may obtain an injunction against a telephone company from erecting its lines upon a street in violation of ordinances prohibiting such erection without the city's consent.² And in Pennsylvania, where the constitution contains a similar provision, it was held that neither the legislature nor the courts can trespass upon the discretion given absolutely by the constitution to the local authorities, and that a municipality, in granting consent, may impose conditions under which the right may be enjoyed;³ and the court said that a city, in granting its consent, might fix the maximum rate of fare and insist upon receiving a certain percentage of the dividends. The ordinance provided that it should not go into effect until accepted by the proper officials, and the court said that this was a condition precedent and must be performed, and that no amount of hardship would alter the rule. There might be unlawful conditions imposed, but it was doubtful whether any right could be obtained without this consent, and public policy required that railroads should pay the cities for the use of the streets.⁴

The same principle was maintained by the supreme court of the United States in two cases, in which it was held that the city of St. Louis (having large legislative powers) might lawfully impose upon a telegraph company a charge of five dollars for each pole by way of rental for the use of the streets.⁵

§ 39. Price or conditions of municipal consent.—Where the right to put up electric wires in the street is made to depend upon municipal consent, and the consent of the local

¹ Colonial City Traction Co. v. Kingston City Ry. Co., 44 N. Y. Supp. 732, 15 App. Div. 195 (1897); St. Michael's Church v. Forty Second St. etc. Ry. Co., 57 N. Y. Supp. 881 (1899).

² Utica v. Utica Teleph. Co., 24 App. Div. (N. Y.) 361, 48 N. Y. Supp. 916 (1897).

³ Allegheny City v. Etna & Sharpsburg St. Ry. Co., 159 Pa. St. 411, 28

Atl. Rep. 202, distinguishing Pittsburgh's Appeal, 115 Pa. St. 4, and citing *People v. Barnard*, 110 N. Y. 55.

⁴ See also *Federal St. P. N. Ry. Co. v. Alleghany*, 14 Pittsb. Leg. Jour. (N. S.) 259.

⁵ *St. Louis v. Western Union Telegr. Co.*, 148 U. S. 92, 4 Am. El. Cas. 102; Same parties, 149 U. S. 465, 4 Am. El. Cas. 115.

authorities is a condition precedent to the existence of the right, then it would seem to be clear that any terms that may be exacted as the price of this consent must be agreed to before any right can be obtained; and the municipalities may require a payment of a definite sum or of a certain portion of the gross earnings, or may insist upon the use of poles and wires of a certain kind, or that electric cars shall be of a certain character and run at certain intervals; that a pavement should be laid between the rails of a street railway, or that certain rates of fare should be charged.¹ Indeed, it is usual for conditions of this kind to be imposed, and to avoid any dispute it is provided that the ordinance imposing the conditions be embodied in a contract to be executed by the city officers and by the officers of the company that is to have the benefit of it.

Some of these exactions may amount to an assumption of the taxing power which does not belong to a city, and others may be unlawful for other reasons; and yet if the consent of the city is made a condition precedent to the legislative grant of a franchise to use the streets, it is necessary for the company desiring the franchise to accept the conditions, and when they are embodied in a contract it is difficult to contest the right of the city to impose them.² When, on the other hand, the right to use the streets for a telegraph or other line of electric wires is given by the legislature, subject only to the usual power of the municipality to regulate the mode of use, then, as will be shown in detail in another chapter,³ the power to regulate cannot be so used as altogether to defeat the grant.

§ 40. Power of municipality with respect to the designation of the route.—If, on the other hand, a right to use the

¹ *Benton Harbor v. St. Joseph & B. H. St. Ry. Co.*, 102 Mich. 386, 60 N. W. Rep. 758 (1894) (paving); *Sioux City El. Ry. Co. v. Sioux City*, 138 U. S. 98 (1890) (paving); *Elevated Ry. Co. of Grand Rapids v. Grand Rapids*, 84 Mich. 257, 47 N. W. Rep. 567 (1890) (paving, poles, etc.); *Allegheny City v. Millville*, 159 Pa. St. 411 (fares); *West Side Ry. v. Barnard*, 110 N. Y. 548 (fares); *Adams v. Union Ry. Co.*, 42 Atl. Rep. 515 (R. I., 1899).

² *In St. Louis Ry. Co. v. Southern*

Ry. Co., 105 Mo. 577, 582, 16 S. W. Rep. 960-962, the court said: "This discretion of the municipality with respect to giving its consent is always subject, however, to review by the courts to prevent opposition and fraud." See *Dill. Mun. Corp.*, § 706; *Railroad Co. v. Leavenworth*, 1 Dill. C. C. Rep. 393; *Jersey City & Bergen R. R. Co. v. J. C. & Hoboken R. R. Co.*, 20 N. J. Eq. 61.

³ Ch. IV, §§ 50-52.

streets is granted by the legislature, subject only to the designation of the streets or the location of the route by the local authorities, then the consent cannot be wholly withheld. The designation of the route in such a case is a matter of regulation and cannot be used to defeat a franchise granted by the legislature.

In a case in New Jersey¹ it appeared that the statute granted to telegraph companies organized under it the right to use the public highways of the state upon first obtaining the consent in writing of the owners of the soil, with a *proviso* that no poles should be erected in any street of any incorporated town without first obtaining from the town a designation of the streets in which the poles should be placed and the manner of placing them. The purpose of such legislation, said Vice-Chancellor Van Fleet, "is to invest telegraph companies with the right to use the streets of an incorporated town for the purpose of erecting their poles therein, subject, nevertheless, to such municipal control as may be necessary to secure to the public safety, convenience and freedom in the use of the streets. The municipal authorities may say what streets shall be used, at what points in the streets the poles shall be erected and how they shall be planted and secured, but they have no power to lay an embargo. They have a right to regulate, but not to interdict, and their regulations, to be valid, must be reasonable and fair."² And in a later case in the same court under the same statute, it was held that the town could not impose new conditions nor require the consent of the town committee to be obtained before stringing wires across the streets. The vice-chancellor said: "The right to the use of the streets has been expressly granted by the legislature, and the power to prohibit or interdict this use so granted cannot be inferred from the declaration in the *proviso* annexed to the grant that the use should be subject to such regulations and restrictions as may be imposed. The restriction intended in such a *proviso* must be held to be restrictions in the nature of regulations, and not restrictions which shall prohibit the use or impose new conditions to the power to exercise the franchise."³

¹ Am. Union Teleg. Co. v. Harrison Co., 24 App. Div. (N. Y.) 361, 48 N. Y. (Town of), 31 N. J. Eq. 628. Supp. 916 (1897).

² See also Utica v. Utica Teleph. ³ Summit Township v. N. Y. & N. J.

It has been held by the supreme court, however, that this statute applies only to through lines.¹ The duty to designate streets is imposed only on a city or town "through which it is intended to construct a telegraph line," and it is not intended to impose this duty with respect to a local system of telephone lines. No distinction was made between the telegraph and the telephone; but the court said there was good reason for discriminating between through lines and those intended for local purposes. As to these the government was left to its own discretion, and was under no obligation to designate streets for the local telephone lines. The distinction seems to be unsatisfactory in view of the use of the local telephone lines from any point for long-distance messages; but the decision is merely on the construction of a New Jersey statute.

Under an ordinance authorizing a telephone company "to run and maintain its wires over and through the streets of a city . . . for the purpose of establishing telephonic communication between its patrons and between its exchange office and the subscribers thereto," and imposing as a condition only that it comply with all ordinances "regulating or in any manner controlling . . . telephone companies in the use of streets for . . . telephone purposes," it has been held in Pennsylvania that the determination of what streets shall be occupied is for the company, except possibly in the case of some street exceptionally situated.²

Even though the town may be bound to make the designation of the streets on application, the making the application

Teleph. Co., 57 N. J. Eq. —, 41 Atl. Rep. 146 (1898). See also *Suburb. El. L. & P. Co. v. East Orange* (N. J. Eq.), 41 Atl. Rep. 865 (1898).

¹ *Home Teleph. Co. v. New Brunswick*, 41 Atl. Rep. 628. Under this same statute the circuit court has power to make a designation of the streets on failure of the town to do so; and it has been held that in so doing it cannot make a contract or include conditions in its order, even though it might perhaps require the acceptance of an ordinance as a condition of the designation of the streets. It may be doubted, how-

ever, whether the designation is discretionary or any such condition could be imposed. *Bayonne v. N. Y. & N. J. Teleph. Co.*, 61 N. J. Law, 136, 38 Atl. Rep. 725 (1897). It has been held in New Jersey that the ordinance designating the streets need not specify the location of the poles, this being left to the discretion of the company (with the consent of the land-owners), under the control of the officers in charge of the streets. *Marshall v. Bayonne*, 59 N. J. Law, 101, 34 Atl. Rep. 1080.

² *Commonwealth v. Warwick*, 185 Pa. St. 625, 40 Atl. Rep. 93 (1898).

is a condition precedent to the right to set up poles and wires in the streets, and an injunction will be granted against it at the suit of persons peculiarly interested and of the attorney-general.¹

§ 41. **The same — Electric-light wires.**— Under a statute declaring that a statute directing towns to designate streets for telegraph lines should apply to electric-light companies “so far as applicable,” it was held in Massachusetts that it was not imperative upon a town to designate streets for electric-light wires. The court said the use of these was local, and a refusal to allow them in the streets of a town would not defeat a business extending over a large territory, and it could not be supposed that the legislature intended to take away from the local authorities the power to decide whether wires for lights in the town were safe and proper or necessary.² The statute relating to telegraphs declared that the mayor and aldermen, or selectmen of any city or village through which a line should pass, “shall designate the streets” where the line should be put up. The court said this ought not to be construed as imperative, nor as taking away from the local authorities the control over the streets.

Under the statute in New Jersey the supreme court has held

¹New York & New Jersey Telephone Co. v. East Orange Township, 42 N. J. Eq. 490; State, Broome pros., v. New York & New Jersey Telephone Co., 49 N. J. L. 624; S. C., 50 N. J. L. 432; Winter v. N. Y. & N. J. Teleph. Co., 51 N. J. L. 83; 2 Dill. Mun. Corp., § 720 (4th ed.). See Franklin Township v. Nutley Water Co., 53 N. J. Eq. 601, 32 Atl. Rep. 331; Stockton v. Atl. H. Ry. Co., 53 N. J. Eq. 483, 32 Atl. Rep. 680.

On the question what is meant by a city or town through which a line may pass, it has been held that the words refer to bodies having control of streets without reference to actual incorporation. N. Y. & N. J. Teleph. Co. v. East Orange, 42 N. J. Eq. 490; Broome v. N. Y. & N. J. Teleph. Co., 49 N. J. L. 624. But see *Ibid.*, 50 N. J. L. 434; and Summit

Township v. N. Y. & N. J. Teleph. Co., 41 Atl. Rep. 146-148.

²Suburban Light & Power Co. v. Boston, 153 Mass. 200, 3 Am. El. Cas. 80, 10 L. R. A. 497, with note (1891).

There is a statute in Ohio providing for the joint use of wires by electric-light companies. The statutory conditions are construed in *Hauss Lighting Co. v. Jones Bros. Electric Co.*, Super. Ct. Ohio, 23 Wkly. Law Bull. 137.

See also *Brush Electric Light Co. v. Jones Brothers Electric Light Co.*, Hamilton (Ohio) Com. Pleas, 23 W. L. Bull. 329, where it was held that a franchise must be obtained under Revised Statutes, §§ 2491, 3550, 3551, although the company had obtained a permit from the board of affairs in pursuance of a city ordinance.

that electric-light companies cannot erect poles in any city without first obtaining from the city a particular designation of the streets in which the same are to be placed.¹

§ 42. Power to revoke franchise and remove poles and wires.—The designation of streets, if once acted on, is not revocable by a city. A company having by legislative authority and municipal consent obtained the privilege of using the street has acquired a franchise which is valuable property.

The legislative permission may of course be made expressly revocable, but it seems that municipal consent once acted upon by the construction of works becomes a binding contract. Therefore, if lines have been constructed under legislative authority, and with such municipal consent as may be required, the municipal officers cannot remove them unless the maintenance of them has been made expressly subject to such action.²

The subject of legislative and municipal contracts and franchises has been fully discussed in the standard works on municipal corporations and constitutional law. I need only refer here to the case directly involving the use of electric wires.

§ 43. The same—Cases relating to telegraph and telephone wires.—In *Hudson Telephone Co. v. Jersey City*³ the question came squarely before the supreme court of New Jersey. A telephone company was authorized by statute to use the highways along the line of its route, upon first obtaining from the incorporated cities or towns a designation of the streets in which the poles should be placed and the manner of placing them. An ordinance was passed by the common council of Jersey City giving the company permission to erect poles or lay an underground cable in certain streets on certain conditions. The company set up poles along the route marked out by the ordinance, and then the common council repealed the ordinance. This last action of the council was brought before the supreme court by *certiorari*. The court (by Reed, J.) said: "I am of the opinion that, as a general rule, a designation of streets by a city gives the company an irrevocable right to use the streets so designated for the purposes indicated

¹ *Meyers v. Hudson County Electric Co.*, 60 N. J. L. 350, 37 Atl. Rep. 618 (1897).

² See cases cited in §§ 43, 44, 45.

³ 49 N. J. L. 303 (1887).

in the statute. Certainly, after the expenditure of money in the erection of poles, made in reliance upon the municipal designation, the company obtains a vested right of which they cannot be stripped by a subsequent revocation of such designation. The notion that a corporation which, under provisions similar to the present act, has, upon the strength of a permission to use a certain route, spent thousands of dollars in laying railway tracks, or subterranean cables, or in erecting posts and stretching wires, is at the mercy of the city authorities continually and entirely, is not to be entertained for a moment;" and it was held that the power reserved by the legislature to repeal all charters did not apply to a common council; and that as the act under which this company was incorporated conferred no power on the municipality to revoke a permission once granted, the grant was subject only to a repeal by the legislature; and "when that corporation had acquired vested rights in the mode designated by their charter, it certainly was not within the power of a common council to strip them of any right so acquired."¹ The court referred to *Commonwealth v. Boston*,² decided by the supreme judicial court of Massachusetts.

In *City v. Telegraph & Telephone Co.*,³ a city made a grant by ordinance to a particular company to use the streets for telegraph and telephone wires upon certain conditions, subject to such ordinances as might thereafter be passed. It was held that this was not a mere revocable permit, but a binding contract.

In *Mutual Union Telegraph Co. v. Chicago*,⁴ a telegraph company had erected poles and strung wires within a city under the permission of an ordinance which provided that the priv-

¹ "The power of a common council," says Mr. Justice Reed in *Hudson Telephone Co. v. Jersey City*, *supra*, "to revoke its permission given by statutory authority to the location of a railroad in the streets of a city, was expressly denied in the case of the People's Passenger Ry. Co. v. Baldwin, reported in 37 Leg. Int. 424, and in the case of Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co., 32 Barb. 358."

As to the power of the legislature to require the wires to be taken down and put underground, see ch. VI.

² 97 Mass. 555. See ch. V, § 61.

³ 40 La. Ann. 41 (1888).

⁴ 16 Fed. Rep. 309 (1883). See also *Philadelphia v. Western Union Telegraph Co.*, 11 Phila. Rep. 327, 35 Leg. Int. 129 (1876), referred to in ch. IV, § 47.

ilege should expire on a certain day. After the time had expired, the mayor, of his own motion and without notice, proceeded to cut down the poles. The court granted an injunction against this, but said that if proper notice had been given, and the mayor had been authorized by the common council, his acts would have been lawful. "I can have no doubt," said Judge Drummond, "that it is entirely competent for the city authorities, unless they are bound by some absolute contract permitting the poles and wires to stand as they are, to have them removed, and put an end to such unsightly obstructions as these poles now are in our streets. There must be power, I think, somewhere to cause them to be removed and to regulate and control the manner in which telegraph lines shall enter and pass through the city."

In *Hannibal v. Missouri & Kansas Telegraph Co.*,¹ it was held by the St. Louis court of appeals that a city will not be allowed to enforce an ordinance peremptorily directing a telephone company to relocate its poles in an impracticable manner, after the poles have been located and allowed, when it is neither averred nor shown that the existing location incommodes the public, nor that there was any good reason for the removal of the poles.

§ 44. The same — Cases on electric railway and electric light wires. — In Illinois it was held by the court of appeals² that the right conferred in consideration of services to be rendered to the public to lay tracks in a public street and to operate cars thereon is a property right and held under certain conditions. It may be forfeited, but it cannot be taken away from its owners, either in whole or in part, by the mere will of the legislature, either for public or private use.

And in the United States circuit court in Tennessee³ it was held that the franchise of a street railway company, when accepted, becomes a contract inviolable and irrevocable, and the consent of the municipality, when once given, cannot, unless the statute provided for withdrawal, be withdrawn either as to the streets actually occupied or as to streets included within

¹ 31 Mo. App. 23 (1888).

³ *Africa v. Knoxville*, 70 Fed. Rep.

² *Chicago General Ry. Co. v. Chicago City Ry. Co.*, 62 Ill. App. 503 (1895).
729 (1895); Same on appeal, 77 Fed. Rep. 501, 23 C. C. A. 252 (1896).

the general plan of the company's routes which it intends in good faith to complete.

So also in Vermont¹ it was held that an ordinance authorizing a telephone company to maintain lines on the streets of a city without limitation as to time, for a stipulated consideration, becomes, when accepted, a contract which the city cannot alter without the consent of the grantee.

In Colorado,² where a city under legislative authority recognized and affirmed a grant it had previously made without authority to a street railway company, and the company in reliance thereon spent large sums of money in the construction of its lines, it was held that the city could not, while the consent remained unrevoked, deny the right of the company to complete the work already begun. And the federal court in Missouri,³ in considering a franchise granted by the city of St. Louis, which has large legislative powers, held that a grant to a telegraph company to use the streets upon the performance of certain conditions becomes a contract when those conditions have been performed, and cannot be modified at the will of the city alone.

In *Levis v. City of Newton and Electric Co.*,⁴ in the United States circuit court in the southern district of Iowa, a preliminary injunction was granted against the removal of the poles and wires of an electric-light company from the streets of a city; and the court said that under the decisions in Iowa a mere license or permission to use the streets was subject to repeal; but that under an ordinance lawfully conferring the right to use the streets, and containing no reservation of a right to repeal or change the ordinance, it was not lawful for a city, without good cause shown, to repeal the ordinance and destroy the franchise of the company and the security of its creditors, and that a temporary injunction against removing the poles and wires should be granted.

¹ Rutland El. Light Co. v. Marble City El. Light Co., 65 Vt. 377, 26 Atl. Rep. 635 (1893).

² Denver Tramway Co. v. Londoner, 20 Colo. 150, 5 Am. El. Cas. 8 (1894).

³ St. Louis v. Western Union Teleg. Co., 63 Fed. Rep. 68, 5 Am. El. Cas. 43 (1894). This decision was made in view of the decisions of the United

States supreme court between the same parties, holding that the city had a right to exact a rental for the use of the streets. 148 U. S. 92, 149 U. S. 465.

⁴ 75 Fed. Rep. 884, 6 Am. El. Cas. 13 (1896); affirmed on appeal, 79 Fed. Rep. 715, 25 C. C. A. 161.

In *City Ry. Co. v. Citizens' Street R. R. Co.* the supreme court of the United States held that the right of repeal reserved by the statute (Laws of Indiana, June 4, 1861) was not delegated to the city government, and that an ordinance giving a franchise to a street railway, which had been acted on by the issue of bonds and the construction of the line, was a valid contract, and that a subsequent ordinance giving a franchise on the same streets to another company was invalid.¹

And in New Jersey, where the statute gives electric-light companies the right to erect poles on highways provided the permission of the municipal authorities be first obtained, it has been held that when permission has been given and wires have been strung the company has a presumptively perpetual franchise, subject to the exercise of the police power, and not a mere revocable license.²

In another case where the ordinance of a township provided that the franchise should be forfeited if certain conditions were not fulfilled, and the company had expended money in building its line, and unforeseen circumstances had caused delay which worked a forfeiture, it was held in New Jersey that an ordinance declaring a forfeiture and directing a sale of the company's property is judicial in its character, and that equity has the same power to intervene and give relief as it has in the case of a forfeiture declared by a court of law.³

In New York it was held by the appellate division of the supreme court that an order of the board of railroad commissioners granting a street railroad the right to change its motive power from horses to electricity, under the authority of the Railroad Law, § 100, after due notice by publication, and on a show-

¹ 166 U. S. 557 (1896). In this case a change of motive power from horses to electricity was held to be ratified by a subsequent statute, and the court declined to decide that the change could not have been made without statutory authority.

² *Suburban Light & Power Co. v. East Orange* (N. J. Eq.), 41 Atl. Rep. 865 (1898).

³ *North Jersey St. Ry. Co. v. South Orange* (N. J. Eq.), 43 Atl. Rep. 53 (1899). The supreme court set aside

an ordinance providing for the summary removal of the tracks of an electric street railway, it appearing that the company had constructed its line under claim of right without objection on the part of the city, and that the ordinance had been passed without giving the company an opportunity to be heard. *Cape May D. & B. & S. P. Ry. Co. v. Cape May*, 58 N. J. Law, 505; affirmed, 60 N. J. Law, 224.

ing of the consent of over half the property owners on the line, is not reviewable by the board in the absence of any express authority given by the statute.¹

Where, however, the ordinance granting permission to use the streets has not been acted upon by the performance of the conditions imposed, it has been held in Maryland that it is subject to repeal when in the judgment of the city council the public safety, convenience, and the proper regulation of the use of the street require it.² And the court has held that a railroad company which has begun to lay its tracks, after notice from the mayor that he would recommend the repeal of the ordinance, is not entitled to compensation for the loss of the tracks. The court said it had been decided in Maryland, as well as in New York, that a city cannot abridge its control of the streets by contract.³

§ 45. Power of the legislature to revoke franchise.—The power of the legislature itself to revoke a franchise, and to direct lines of poles and wires to be removed, involves different considerations, and the subject is not within the scope of the present chapter. It depends upon the question whether the grant is a contract which is inviolable under the constitution of the United States, and whether, if it be so, it is still subject to the express or implied reservation of the continuing power of the legislature to regulate and control the use of the public streets. Some important cases on this subject are referred to in the chapter that treats of the removal of wires from poles overhead and the placing them underground.⁴ (Chapter VI.)

¹ *People v. Board of Railroad Com'rs of State of New York*, 51 N. Y. Supp. 781, 30 App. Div. 69 (1898).

² *Lake Roland El. Ry. Co. v. Baltimore*, 77 Md. 352, 26 Atl. Rep. 510 (1893). City held to be estopped from claiming forfeiture of a franchise of an electric light company. *Commercial El. Light & Power Co. v. Tacoma*, 50 Pac. Rep. 592.

³ Citing *People v. O'Brien*, 111 N. Y. 1; *Davis v. New York*, 14 N. Y. 506; *Milhau v. Sharp*, 27 N. Y. 611, dis-

tinguishing *New Orleans, etc. R. R. Co. v. Delamore*, 114 U. S. 501.

⁴ In a case in New York relating to the value of the interest of a telegraph company in the land occupied by its poles, the court of appeals said that the right granted by the statute and the municipal consent to use the streets for planting the poles was a mere license, revocable by the legislature. *People ex rel. West. Union Teleg. Co. v. Dolan*, 136 N. Y. 166 (1891).

CHAPTER IV.

MUNICIPAL CONTROL CONTINUED.

REGULATIONS, CONDITIONS, CONSENT.

§ 46. General power of police regulation with respect to poles and wires.—What conditions may properly be imposed.—Even though the legislative grant is not made expressly subject to municipal control or the assent of the local authorities, the grant must be taken to be subject to the general control of municipal corporations over streets.¹ Under the ordinary power to regulate streets, and in the absence of extraordinary immunities conferred on the company by its charter, city governments, no doubt, have the right to supervise and control the erection of telegraph lines and all lines of electric posts and wires in the streets, with a view to public safety and convenience, and to see to it that the poles are not so placed as to cause unnecessary obstruction, that the wires are strung so high as not to interfere with public travel, and that the system is so constructed as not to be dangerous.² They may prescribe the size and shape and materials of the poles; they may designate the streets along which the lines shall go, and require a statement or map showing the location of the several poles to be submitted to the proper officers. In short, they may regulate the manner of the use of the streets, and take care that the power granted by the legislature to use the streets for these purposes is so used as not to interfere with the other lawful uses of the streets, and not to cause danger or inconvenience to the public.

A municipal ordinance prohibiting any person from suspending wires used for conducting electricity over or across the roof of any building has been held to be within the proper powers of a city, in a case in which it appeared from the evidence that the stretching of these wires over buildings was

¹ 2 Dill. Mun. Corp. (4th ed.), § 680. Co. v. Town of Harrison, 31 N. J. Eq.

² 2 Dill. Mun. Corp. (4th ed.), § 698, 627, 630.
and note on p. 830; Am. Un. Teleg.

extremely dangerous, both as being likely to originate fires and as interfering with the extinguishment of fires otherwise originated. The court said, moreover: "Indeed, the danger is a matter of common knowledge. We might almost as well require strict proof of the danger of storing gunpowder or dynamite in, under, upon or about our houses. Even if these wires can be so put up and insulated as to be safe in the mode suggested by one of the complainant's witnesses, Prof. Keith, it has not been done."¹

§ 47. Cases on this point relating to telegraph lines in cities.—Even in a case in which immunity was claimed by a telegraph company as carrying on commerce between the states, Drummond, J., said: "Notwithstanding telegraph lines may be instruments of commerce, a city has the right, as I believe, to determine how, in what manner and upon what conditions a telegraph company shall enter and pass through it for the purpose of allowing the citizens of the country to communicate by telegraph one with another."²

In *Philadelphia v. Western Union Telegraph Co.*,³ it was held that cities have the right to regulate the construction of telegraph lines within their limits, and to insist that the erection of them shall be under the supervision of the superintendent of the police and fire-alarm telegraph. All grants of power to private corporations to carry on business in Philadelphia were made, the court said, upon the implied condition that they should be subject to any such reasonable restriction as the city might think necessary, and that they should obey reasonable ordinances; and it was held that the company, not having applied to the superintendent for directions, had no right to put up its lines. The court said the city made no claim to prevent the running of the line, but only to supervise and direct it and to require plans and locations to be submitted, and this was reasonable and proper. But while the court thought underground wires were entirely practicable, it said that, as the legislature had authorized the use of both methods of construction, it was not for the court to confine the company to the use of only one.

¹ Electric Impr. Co. v. San Francisco, 45 Fed. Rep. 593; The Same v. Scannell, Ibid., 596, 13 L. R. A. 131 (1891).

16 Fed. Rep. 309 (1883). See ch. III, § 43, where this case is more fully stated.

³ 11 Phila. Rep. (Pa.) 327, 33 Leg.

² Mut. Union Teleg. Co. v. Chicago, Int. 129 (1875).

In a later case it was held by the supreme court of Pennsylvania¹ that the city of Philadelphia has the right, as a matter of police regulation, to supervise and control by ordinance the erection of poles and wires in the streets.

Where the city charter provided that no obstruction should be placed in the streets without a written permit from the board of public works, it was held in a recent case in Wisconsin that a telephone company had no right to place poles in the streets except under the direction of the board of works, even though the board had passed no ordinance relating to telephone poles.²

§ 48. **Cases relating to electric-light wires in cities.**— In the case of wires for electric lighting, which is a matter of local concern, larger discretion is ordinarily left with the local authorities than with respect to the telegraph and telephone, which are of wider interest and affect the intercourse between different towns; and it has been held by the supreme judicial court of Massachusetts³ that local authorities have the power to decide whether wires for local lighting are safe and proper and necessary, and although the statute relating to telegraphs gave permission for the erection of poles and wires, and the said selectmen shall designate the streets for the purpose, and another statute declared that this act “so far as applicable”

¹ *Western Union Teleg. Co. v. Philadelphia* (Pa. Supr. Ct., January 23, 1888), 12 Atl. Rep. 144, 21 Am. & Eng. Corp. Cas. 40, with note, 22 W. N. C. 39.

But a city has been held liable for damages in removing wires from house tops and carrying them away without giving the owner of the wires an opportunity to reclaim them. *Electric Power Co. v. New York*, 55 N. Y. Supp. 460 (1899).

A preliminary injunction will not issue at the suit of a town to enjoin the running of an electric wire across a street at the height of twenty-five or thirty feet, where there is no ordinance against it and it does not interfere with the use of the street. *Brigantine v. Holland Trust Co.* (N. J. Eq.), 35 Atl. Rep. 344.

With respect to the police power over streets, see *Consolidated Traction Co. v. Elizabeth*, 58 N. J. L. 619, 34 Atl. Rep. 146; *Cape May R. R. Co. v. Cape May*, 59 N. J. L. 396.

As to the power to require the poles to be painted, or straight poles to be substituted for crooked ones, see *Hardwick v. Vermont Teleg. & Teleph. Co.*, 78 Vt. 180, 40 Atl. Rep. 169.

² *Marshfield v. Wisconsin Teleph. Co.* (Wis.), 78 N. W. Rep. 735 (1898). See also, as to terminal poles, *Commonwealth v. Warwick*, 185 Pa. St. 623, 40 Atl. Rep. 93.

³ *Suburban Light & Power Co. v. Boston*, 153 Mass. 200, 3 Am. El. Cas. 80, 10 L. R. A. 497 (1891). As to electric wires of any kind over the roofs of houses, see § 46, *supra*.

should apply to electric-light companies, yet it was held that it was not intended to take away from the municipalities the power to determine whether or not the streets of the city should be used by electric-lighting companies of a local character, even though their organization was authorized by statute.¹ The supreme court of the United States has held² that *mandamus* will not issue to require a street commissioner to permit the laying of electric wires in a street where the company claims the right to lay the wires without complying with the reasonable public regulations of the city, and has not in fact offered to comply with such of the regulations as are lawful. The court held that these regulations did not impair the obligation of the contract contained in the light company's charter. Affirming the decision of the supreme court of Missouri,³ Chief Justice Fuller said: "Considering the danger to life and property from electric wires when charged, it seems to the court too plain for argument that the city should have the right to direct the manner in which their use should be exercised. . . . If the company, as it is asserted, possessed the right to place electric wires beneath the surface of the streets, that right was subject to such reasonable regulations as the city deemed best to make for the public safety and convenience, and the duty rested on the company to comply with them."

§ 49. Cases relating to the electric railway.—Electric street railways, although authorized by statute and by ordinance, are especially subject to municipal control with respect to the operation of the cars and with a view to the safety of public travel. The power of a city in this regard is discussed in a well-considered case in New Jersey,⁴ and the same principles are applica-

¹See also *Edison El. Ill. Co. v. Hooper*, 85 Md. 110, 36 Atl. Rep. 113 (1897).

²*Missouri v. Murphy*, 170 U. S. 78 (1898). See also *Utica v. Utica Tel. Co.*, 24 App. Div. (N. Y.) 361, 48 N. Y. Supp. 916 (1897). Under the charter of "Greater New York," sections 584, 612, 668 and 690, and Laws of 1892, chapter 263, electric-light companies cannot erect poles or string wires along the avenues of a park without the consent of both the park commis-

sioner and the commissioner of public buildings. *Sheehy v. Clausen*, 55 N. Y. Supp. 1000 (1899). As to the meaning of a contract requiring the location of lights to be determined by the town board, see *Bronx Gas & Electric Co. v. New York*, 41 N. Y. Supp. 358, 17 Misc. Rep. (N. Y.) 433.

³*Laclede Gaslight Co. v. Murphy*, 130 Mo. 10 (1895).

⁴*Cape May R. R. Co. v. Cape May*, 59 N. J. L. 396.

ble to the construction of the lines of poles and wires. It has been held in Louisiana¹ that an ordinance requiring splices on electric wires to be insulated was a proper exercise of municipal control; and in Wisconsin that an ordinance providing for guard wires over the service wires of an electric railway where they crossed under other wires was a reasonable police regulation;² and, after citing these and other cases, the supreme court of New Jersey said: "It must at this day be conceded that municipal authorities, having the regulation of the use of the streets, have the power to pass all ordinances to reasonably guard and secure ordinary public safety and convenience, whether in relation to the construction of the road or its equipment."³

§ 50. The power to regulate does not imply the power to lay an embargo.—If, however, the legislature has distinctly conferred the power to use the streets, the power to regulate is not the power to lay an embargo. If a legislative franchise has been granted, a municipal corporation cannot, under the guise of a regulation, prevent the exercise of the franchise. The power must be exercised so as to regulate the manner of the use of the streets, and not so as to deprive a company of a franchise conferred upon it by the legislature.⁴

In a case in New Jersey⁵ the board of works of Jersey City applied to the chancellor for an injunction against the erection

¹Clements v. Louisiana Electric Light Co., 44 La. Ann. 692 (1892), 11 S. Rep. 51.

²Wisconsin Teleg. Co. v. Janesville St. Ry. Co., 87 Wis. 72. See also ch. XIII, *infra*, and cases cited.

³Cape May R. R. Co. v. Cape May, 59 N. J. L. 403.

⁴North Hudson Co. Ry. Co. v. Hoboken, 41 N. J. L. 71 (1879); Muhlenbrinck v. Commissioners, 42 N. J. L. 364; Summit Township v. N. Y. & N. J. Teleph. Co., 57 N. J. Eq. 123, 41 Atl. Rep. 146 (1898); Richmond v. Southern Bell Telephone Co., 85 Fed. Rep. 19 (C. C. A., 1898).

"The distinction between the power of taxation for revenue and police powers which are granted for the maintenance of order and the administration of the internal affairs

of a municipality is pointed out," says Mr. Justice Depue in the former case, "in State, Benson pros., v. Hoboken, 33 N. J. L. 280," and the same judge discusses the matter fully in the North Hudson Co. Railway case above cited, and refers to many cases and the following text-books where the cases are collected: Broughs on Taxation, 392; Cooley, Const. Lim. 201; 1 Dill. Mun. Corp. (4th ed.), § 291; Cooley on Taxation, 408. See, however, for a case on the other side of the line, Flanagan v. Plainfield, 44 N. J. L. 118, where it was held that the power to tax for revenue was conferred with the power to license the sale of liquor.

⁵Jersey City v. Jersey City Bergen St. Ry. Co., 15 N. J. Law Journ. 109 (1892). See also ch. X.

of poles in the streets and the operation of a street railway by the overhead or trolley system of furnishing electricity. It appeared that the legislature by general law had authorized the use of electric motors on obtaining the consent of the municipal authorities and that the common council had given their consent to the use of the trolley system. The chancellor denied the injunction, but when the board of works insisted that the line was being so constructed as to be dangerous, he allowed testimony to be presented to show that the manner of construction was improper, but not to discredit the trolley system itself, because a grant to use this had already been made by the legislature with the consent of the common council.¹

§ 51. The power to regulate does not imply the power to fix tolls and rates.—The power to regulate does not include the power to fix tolls or charges. The state can regulate charges, and it may delegate to a municipality the power to do so; but even though the legislature (or the constitution, as in the case of the city of St. Louis) has given the city the most plenary powers for the regulation of the use of the streets for railroads and telegraphs and electric wires generally, the power to limit charges is not conferred. This is not a regulation of the use of the streets, but an interference with the franchise, or right to receive tolls. It has been so held by the supreme court of Missouri with respect to the Bell telephone wires in the city of St. Louis, which has almost legislative powers over the streets.²

In a later case in Michigan,³ where a common council had granted permission to a street railway company to operate its line by electricity, it was held that the council could not thereafter, in designating the kind of poles that should be used, require the company to furnish free transfer tickets in consideration of obtaining the right to use a particular kind of pole,

¹ See, however, *Suburban L. & P. Co. v. Boston*, 153 Mass. 200, 3 Am. El. Cas. 80; § 41, *supra*.

² *St. Louis v. Bell Teleph. Co.*, 96 Mo. 623, 2 Am. El. Cas. 44 (1888).

As to the power of common councils to regulate the use of streets, see *Trenton Horse R. R. Co. v. Trenton*,

53 N. J. L. 132, where it was held that a city might pass an ordinance forbidding horse cars to be run without conductors.

³ *Electric Ry. Co. v. Grand Rapids*, 84 Mich. 257, 47 N. W. Rep. 567, 3 Am. El. Cas. 67 (1890).

notwithstanding the right to make further regulations had been reserved. This decision, however, was made under a statute forbidding municipalities to revoke a consent once given.

In a circuit court in Ohio it was held in 1897 that a city cannot, in making an agreement as to the use of its streets, fix the rentals to be charged to the patrons of a telephone company for the use of its instruments.¹

§ 52. The power to regulate the character or location of the poles and wires does not imply power to impose other conditions.—Where a company has power under a statute to place poles in the streets subject to the regulation by city ordinance of the location of the poles and the kind of poles that shall be used, it has been held that the city has no right to prescribe other conditions and to refuse permits because these conditions were not accepted, and that a *mandamus* should issue to compel the board of improvements to grant a permit for the construction of the line along the streets referred to.²

In the case of an electric railway it was held that where permission to use electricity as a motive power had been granted by the legislature, with authority to erect poles, "the kind and pattern to be approved by the common council," the council was bound to approve of a proper kind of pole, and could not, after approving of iron poles, insist on the company giving free transfer tickets in consideration of being allowed to use wooden poles. The court said that such a condition was in conflict with the statute providing that a city shall not revoke a consent once given, nor deprive a company of rights and privileges conferred.³ And in New Jersey, when a general statute gives to telegraph and telephone companies the right to stretch wires along the streets of incorporated cities and towns under certain conditions, and subject to such "regulations and restrictions" as may be imposed by the corporate authorities, it has

¹State v. Central Union Teleph. Co., 14 Ohio Cir. Ct. Rep. 273, 7 Ohio Dec. 536.

²State v. Flad, 23 Mo. App. 185 (1886). One of the conditions imposed related to the use of posts and wires by another company, and the other limited the number of wires to such as were absolutely necessary.

³Electric Ry. Co. v. Grand Rapids, 47 N. W. Rep. 567, 84 Mich. 257 (1890).

The statute of New Jersey giving the circuit court power to designate streets for a telegraph line does not empower it to impose conditions outside of the statute. Bayonne v. East Jersey Telegr. & Teleph. Co., 61 N. J. L. 136, 38 Atl. Rep. 752.

been held that an ordinance providing that no telephone wire shall be stretched across any street without the consent of the township committee is invalid,¹ and also that the stringing of wires twenty feet above the ground on poles already erected cannot be enjoined by the municipality by virtue of its general control over streets.²

§ 53. Condition that other companies shall be allowed to use the same poles.—There seems to be some question whether it is competent for cities to insist that the right to set up poles and wires in the streets shall be subject to a condition that other companies shall have the privilege of using the same poles on paying a proper rental. In Ohio there is a statute giving the probate courts power to decide what municipal franchises shall be granted, and in what manner; and while it has been decided that these courts may grant the right to put up poles and wires, subject to the rights granted by the courts to other companies to use the same poles on paying a fair rental, it has also been held that a company obtaining its rights under a municipal ordinance could claim no right to use the poles under the decision of the probate court, and that the board of public affairs had no power to impose such a condition.³

In a case in Michigan⁴ the statute gave companies the power to construct and maintain conductors for electricity through the streets; and an ordinance provided that all poles for electric lighting should be and remain under the control of the council so far as to permit their use by other parties for lighting purposes on payment of a reasonable portion of their cost. It was

¹ *Summit Township v. N. Y. & N. J. Tel. Co.*, 57 N. J. Eq. 123, 41 Atl. Rep. 146 (1898).

² *Brigantine Borough v. Holland Trust Co.* (N. J. Eq.), 37 Atl. Rep. 438 (1897).

³ *Hauss Lighting Co. v. Jones Bros. Electric Co.* (Ohio Supr. Ct., Special Term), 23 W. L. Bull. 137. See also *Brush Electric Light Co. v. Jones Brothers Electric Co.* (Hamilton Com. Pleas, Ohio), 23 W. L. Bull. 329, where it was held that a company, having obtained a decree of the probate court and a permit from the board of public affairs to use poles on pay-

ing a proper rental under the ordinance, must still obtain a grant or franchise under the statute. R. S., §§ 351, 2491 and 3550.

Where local authorities have full control of location of poles and electric wires, it is not unlawful for telephone companies and electric railway companies to use the same poles, with the consent of the municipal authorities. *Bergin v. Southern N. E. Tel. Co.*, 70 Conn. 54, 83 Atl. Rep. 888.

⁴ *Citizens' Electric Light Co. v. Sands*, 95 Mich. 551, 55 N. W. Rep. 452, 4 Am. El. Cas. 53 (1893).

held that, after a company had erected poles, the council could not by resolution allow another company to use the poles, unless the manner of such use was first definitely fixed.

Under a statute in Ohio¹ providing that an electric light and power company may construct wires, posts, etc., through the streets of a city "with the consent of the municipal authorities and under such reasonable regulations as they may prescribe," it was held that the common council had a continuing power to provide that another company might use the poles already in the streets and to fix a reasonable compensation for such use.²

In *North Baltimore Pass. Ry. Co. v. North Ave. Ry. Co.*,³ it appeared that a street railroad company had been incorporated in 1879, with power to construct and operate its road subject to such conditions as the common council should impose, and that the council, in granting a franchise, reserved the power to grant to any other company the right to use the tracks. It was held by the court of appeals of Maryland in 1892, that the council had the power to give an electric railway company the right to use the tracks and to make such changes as were necessary to adapt them to the electric system.

§ 54. **Extent and meaning of the power to impose license fees.**—The power to regulate may imply the power to license, but the license fees must be imposed only for the purpose of regulating, and must be only such as are reasonably necessary for that purpose. The power cannot be used for the purpose of revenue; authority to regulate and to license does not confer the power of taxation.⁴

Authority for these propositions may be found in any text-book on municipal corporations, and I will only cite cases relating especially to posts and wires in the streets.

There was an unreported case in the Philadelphia common pleas in 1883 between the Western Union Telegraph Company

¹ Act of 1886, Smith & B. Stat., § 8035, subd. 233. Island Midland Ry. Co. v. Staten Island Electric Ry. Co., 54 N. Y. Supp. 598 (1898), as to franchise for joint use of tracks.

² Toledo Electric St. Ry. Co. v. Western El. L. & P. Co., 10 Ohio C. C. R. 531. ⁴ Am. Union Teleg. Co. v. Harrison (Town), 31 N. J. Eq. 627, per Van Fleet, V. C.

³ 75 Md. 233, 23 Atl. Rep. 466, 4 Am. El. Cas. 1 (1892). See also Staten V. C.

and the city of Philadelphia,¹ in which it was held that cities had power to regulate the construction of telegraph lines and to impose a license fee, and that a charge of \$5 a pole per annum was not unreasonable. This was followed in Delaware county in 1886,² and in Lancaster county in 1888,³ but there was a contrary ruling in Centre county about the same time.⁴

The first case⁵ was approved by the supreme court in January, 1888. It was held that the city had a right to control the erection of telegraph poles in the streets. The court held that a license fee of \$5 for each telegraph pole, and \$1.50 for each mile of wire, might be sustained as a police regulation, although not as a tax; and the court said the amount of the fee was to be measured not merely by the cost of taking care that the lines are kept in good order, but also by the responsibility and risk imposed by the presence of the lines of wires in the streets, and that a license fee of \$1 a year per pole and \$2.50 per mile of wire was not so obviously excessive as to authorize a revision of the act of the city council. This was followed by the supreme court in 1892,⁶ and the court said the ordinance providing for inspection and a license fee was in the exercise of the police power, and the only question was whether it was a reasonable exercise of such power; and in 1893 the decision in the case in Delaware county was affirmed, and the supreme court said it was not sufficient for the company to aver that the license fee was out of proportion to the necessary expenses of the municipality in issuing licenses; the duty of the city to see that the poles were safe and the risk of liability for accidents must also be considered.⁷ These decisions were approved and the ordinance of the city of Philadelphia again sustained by the supreme court in 1895.⁸

¹ See the cases next cited.

² *Chester v. West. Union Teleg. Co.*, 3 *Lanc. Law Rev.* 164, 2 *Am. El. Cas.* 93.

³ *Lancaster v. Edison Illum. Co.*, 8 *Pa. Co. Ct. Rep.* 178, 2 *Am. El. Cas.* 116; *El. Light Co. v. City*, 4 *Del. (Pa.)* 117.

⁴ *Phillipsburgh v. Cent. Penn. Teleph. & Supply Co.*, 23 *W. N. Cas.* 572, 2 *Am. El. Cas.* 105.

⁵ *Western Union Teleg. Co. v. Philadelphia*, 12 *Atl. Rep.* 144, 22 *W. N. Cas.*

39, 2 *Am. El. Cas.* 93, 21 *Am. & Eng. Corp. Cas.* 40. See also *Philadelphia v. Western Union Teleg. Co.*, 81 *Fed. Rep.* 948 (1897); *Norristown v. Keystone Teleg. & Teleph. Co.*, 15 *Montg. Co. Law Rep.* 9.

⁶ *Allentown v. Western Union Teleg. Co.*, 148 *Pa. St.* 117, 4 *Am. El. Cas.* 90.

⁷ *Chester v. Western Union Teleg. Co.*, 154 *Pa. St.* 464, 4 *Am. El. Cas.* 100 (1893).

⁸ *Philadelphia v. American Union*

In one of these cases¹ the court said the reasonableness of the fee was a question for the court, the burden being on the defendant to show that it was unreasonable. In this case the ordinance required the owners of all electric-light poles to number and initial each pole, and to take out a license on payment of fifty cents a year for each pole, under a penalty of \$5 for each and every offense. It was held that the ordinance was valid, but that a company refusing to mark and number its poles and pay the license fee on each pole was guilty of but one offense, and subject to only one penalty. In another case the license fee was to be paid by giving the city one free light out of every thirty, and this was held valid.²

In the meantime the decision of the county courts was disapproved by the United States circuit court in Pennsylvania³ with respect to the amount of the license, and it was held that cities could not tax telegraph companies nor impose license fees amounting to a tax, but only for the purpose of paying the necessary expenses of supervision with a view to the public safety; but this limitation was not altogether sustained by the United States supreme court in a case to be referred to presently.⁴

After this it was held by the circuit court of appeals that the city of Philadelphia may lawfully impose a license tax upon the poles and wires of a telegraph company, even though it is a corporation of another state and is engaged in interstate commerce, and that the question whether the tax is reasonable is the subject of judicial inquiry and may be determined by a jury.⁵ The court said that a wide range of evidence must be

Telegraph Co., 167 Pa. St. 406, 6 Am. El. Cas. 85. See also *New Castle v. Electric Co.*, 16 Pa. Co. Ct. Rep. 663 (1895).

¹ *Lancaster v. Edison Electric Ill. Co.*, 8 Pa. C. C. Rep. 178; *Telegraph Co. v. City*, 22 W. N. Cas. (Pa.), 39, 3 Lanc. (Pa.) 164.

² *Electric Light Co. v. City*, 4 Del. (Pa.) 117. License fee of \$1 per pole and \$2.50 per mile of wire held to be proper exercise of the police power (*Taylor v. Central Penn. Teleph. Co.*, 4 Lack. Legal News, 191 (1898); *Taylor v. Postal Telegraph & Cable Co.*,

4 Lack. Legal News, 111 (1898). Tax of fifty cents per pole per annum held unreasonable when it appeared that the cost of inspection was five cents per pole. *Saginaw v. Swift Electric Light Co. (Mich.)*, 72 N. W. Rep. 6 (1899).

³ *Philadelphia v. Western Union Telegraph Co.*, 40 Fed. Rep. 615.

⁴ *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 4 Am. El. Cas. 103 (1893).

⁵ *Philadelphia v. Western Union Telegraph Co.*, 89 Fed. Rep. 454 (C. C. A., 1898).

admitted because the reasonableness depends upon all the facts and circumstances, and the inquiry involves not only the cost of direct regulations and oversight, but also the incidental cost of maintaining a proper system of supervision.

§ 55. **The same continued.**—In Kansas¹ it was held that a license fee of \$12 a year for each business telephone and \$10 for each residence telephone could not be declared unreasonable without proof of the privileges enjoyed and burdens borne by the telephone company, and of the expenditures and necessities of the city; and in Florida a telephone plant having separate wires in the aggregate more than twenty-five miles in length was held to be subject to the license fee of \$100 imposed upon all such companies unless their line is less than twenty-five miles in length.²

The ordinance of the city of Philadelphia was afterwards declared valid by the supreme court of New York, which cited and approved the Pennsylvania cases;³ and the opinion contains an important discussion of the elements of the municipal expense upon which the license fee may properly be based. In Maryland an ordinance imposing a license fee of \$2 per annum for each pole was sustained by the court of appeals;⁴ and in Illinois an ordinance requiring a street railroad company to pay an annual tax on each mile of its road as a condition of its right to construct and operate its line did not deprive the company of its property without due process of law. The court said it could not be assumed that the motive of the city was to raise a revenue under the guise of a license fee or regulation (it not appearing that the fee was unreasonable), and that at any rate the city had power under the statute to impose as a condition the payment of a reasonable tax or license fee, and that, even if the ordinance were *ultra vires*, yet it could not be treated as prohibited and against public policy, and, the company having accepted it and agreed to pay the amount prescribed, it could not now repudiate the contract.⁵

¹In re Chipchase, 56 Kan. 357, 6 Am. El. Cas. 92. License fee of \$5 upon each telephone, though used in interstate business, held valid. Ogden v. Crossman (Utah), 53 Pac. Rep. 985.

²So. Bell Teleph. & Teleg. Co. v. D'Alembrie, 21 S. Rep. 570 (1897).

³Philadelphia v. Postal Teleg. Co., 67 Hun, 21, 4 Am. El. Cas. 92.

⁴Postal Teleg. Co. v. Baltimore City, 79 Md. 502, 29 Atl. Rep. 819 (1894).

⁵Chicago Gen. Ry. Co. v. Chicago, 176 Ill. 253, 52 N. E. Rep. 880 (1898).

On the other hand, in Louisiana it was held, in 1888,¹ that where a telegraph company had already set up its line under an ordinance upon certain terms, the city had no power to impose a license fee of \$5 per pole in "consideration for the privilege of using the streets." The court said it was not pretended that this was either a tax on property or a license fee, nor that it was a police regulation; it was a mere charge for a privilege which had already been granted on other terms, and was in violation of the contract between the city and the company.

In a case in which the ordinance declared that the fee was payable for "the privilege of using the streets," the supreme court of the United States held that it was not a privilege or license tax. The amount, the court said, is not graduated by the amount of business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. A tax is a demand of sovereignty; a toll is a demand of proprietorship.² The court said that the fact that the city derived revenue from the charge did not make it a tax. The revenues of a municipality may come from rentals as legitimately as from taxes. The streets of St. Louis belong to the city for public purposes, and the defendant is making an exclusive and permanent use of a certain portion of them for the purposes of its business. That use, although a public use, is different in kind and extent from that enjoyed by the public generally, and there is nothing to prevent the public from exacting rental for the space thus occupied. Viewed in this light, the court said the charge of \$5 a year for each pole did not appear to be unreasonable, and the decision of the circuit court against the validity of the ordinance was reversed.³

This decision, it must be observed, is based upon the peculiar legal position of the city of St. Louis, in which, under the constitution, the rights of the public in the streets and the whole

¹ *New Orleans v. Great South. Teleg. Co.*, 40 La. Ann. 41, 2 Am. El. Cas. 122. (1893); citing *State Freight Tax Cases*, 15 Wall. 232, 278.

² *St. Louis v. West. Union Teleg. Co.*, 148 U. S. 92; S. C. on rehearing, 149 U. S. 465, 4 Am. El. Cas. 102-105. ³ *St. Louis v. West. Union Teleg. Co.*, 63 Fed. Rep. 68.

sovereign control of the streets are vested in the city and not in the state. Cities ordinarily have not title to the streets, and the rights of the public therein are under the control of the state, and the cities have only such powers of regulation as are conferred by statute. It would seem, therefore, that the theory of a rental is not one which could be applied satisfactorily in all cases, and it may be doubted whether cities have the power to rent any portion of the public streets, even for public purposes, without express legislative authority, and this authority should contain some reference to the amount of rental to be charged.

In a subsequent case between the same parties, in the United States circuit court in Missouri, it was held that the city of St. Louis, having granted a franchise upon certain conditions for the benefit of the city, which were accepted, could not afterwards exact a rental for the privilege of using the streets, and that, even if they could, a charge of \$5 per pole was, under the circumstances, and having reference to the value of the land, exorbitant.¹

And the supreme court of Mississippi, referring to the decision of the supreme court of the United States, said it was based upon the fact that the city of St. Louis held an unique position, and held that where the legislature has given authority to a telegraph company to occupy the streets of a city free of charge, the city cannot exact a payment by way of license fee or rental.²

§ 56. Municipal rights in the streets are not those of an owner, but are held for public purposes.—The rights of the municipality in the streets are not like those of individual land-owners in their lands. The city has no right, as owner of the soil, to object to the presence of the poles and wires, but it

¹St. Louis v. West. Union Teleg. Co., 63 Fed. Rep. 68, 5 Am. El. Cas. 43 (1894).

²Hodges v. West. Union Teleg. Co. (Miss.), 5 Am. El. Cas. 56 (1895). As to the distinction between the power of taxation for revenue and the police powers, see cases cited in note 1 on page 47.

For a further discussion of state and municipal taxes or license fees

on telegraph lines, see the chapter on Telegraphs and Post Roads, *infra*.

County commissioners may require a street railway company to share the expense of strengthening and repairs of a bridge, and to pay rental, as a condition of consent to the use thereof. Lawrence County v. New Castle Elect. Ry. Co., 8 Pa. Super. Ct. 313, 43 W. N. C. 76 (1898).

acts only as guardian of the public easement. Accordingly it was held in New Jersey, in a case where the poles were on private lands, and only the wires were over the streets, that no injunction would be granted where it appeared that the wires hung twenty-five feet from the ground, and that the authorities had not even considered the question whether they were a nuisance.¹

Unless the land in the streets has been conveyed to the city, the fee is ordinarily in the owner of the adjoining lands;² and when land is dedicated or condemned for a highway, or even taken for a turnpike, the title generally remains in the existing owners of the land, and it is only the street or road, as such, that is vested in the public authorities, and this is held in trust for use as a street.³

In *Coverdale v. Charlton*⁴ it was held by the English court of appeal that under an act providing that the street should vest in the district board, the property in the street so far vested in the board that it could demise the right to depasture cattle there, so far as to give the lessee a right of action against a wrong-doer.

In *Wandsworth Board of Works v. United Telephone Co.*,⁵ an action was brought by a local board against stretching telephone wires over and across a street. The wire was fastened to chimney tops and passed over the street in several places, and in some cases at a very acute angle. The wire was nowhere less than thirty feet from the ground. Stephen, J., found that the wire was not a nuisance to the highway, and that in the ordinary course of events it was likely to cause no perceptible danger to the public, although a violent storm might possibly blow it down. He held, however, that the local

¹ *Am. Union Teleg. Co. v. Harrison* (Town of), 31 N. J. Eq. 627.

² *Kent's Comm.* 434. See note 2, ch. VII, § 78. *infra*.

³ In *Davison v. Gill*, 1 East, 69, Lord Kenyon said: "As to the consent of the trustees of a turnpike road, the soil was not vested in them, but remained in the persons who were entitled to it before they were appointed. The trustees have only the control of the highways." See also

Marquis of Salisbury v. Great Northern Ry. Co., 5 C. B. (N. S.) 174-208.

The public streets of a city are held in trust by the city for the use of the public, and, as streets, they cannot be lawfully contracted or given away for private uses. *Chicago General Ry. Co. v. Chicago City Ry. Co.*, 62 Ill. App. 502; *North Chicago St. Ry. Co. v. Cheetham*, 58 Ill. App. 318.

⁴ 4 Q. B. D. 104 (1878).

⁵ 9 Q. B. D. 904 (1884).

board, as owners of the soil, had an absolute right to prevent the defendants from suspending wires over the street, upon the principle that the air above the roadway was as much their property as the roadway itself. This decision was reversed in the court of appeal, and it was held that the board of works had only such title as was given it by act of parliament, and that under an act declaring that the streets should "vest in and be under the management and control of the vestry or district board," the title to the streets was given to the board so long as the land remained a street, but that the word "street" did not include an indefinite right to the soil downward, and to the air upward, but only the surface and so much above and below it as was necessary and usual to be used for the protection of the enjoyment of the public. Bowen, L. J., said: "All that I feel called upon to say is that I am satisfied that the board of works have not any proprietary interest above the street, except what is necessary to protect the street and the traffic from interruption or danger, or to enable them to exercise their powers in the street."

It was held that the learned judge erred in applying the doctrine of *Coverdale v. Charlton* so as to extend the area which was vested in the board of works beyond the area of user and make it include the area of possible interference.

§ 57. What are the "local authorities."—Where the statute required the consent of the local authorities to the construction of a telegraph line, and the road along which it was to be put up was in the control of a turnpike company, it was contended that the consent of this company was sufficient; but the court held that by "local authorities" were meant the officers of the city, town or village whose duties and powers relate to the supervision, care and maintenance of the streets and highways, and that in this case, in which the road was not in a city or village, but in a "town" or township, *i. e.*, out in the country, the authorities were the commissioners of the highways.¹

It has been held in New Jersey² that the statute requiring a designation of the streets in any incorporated city or town through which the line may pass applies to those communities

¹ Re Rochester Electric R. Co., 133 & N. J. Teleph. Co., 49 N. J. L. 624; N. Y. 351, 46 Am. & Eng. R. Cas. 127. S. C., 50 N. J. L. 432.

²The State, Broome pros., v. N. Y.

in which streets rather than roads are laid, and to the legislative bodies to which the control of those streets is given, and that although East Orange was a township, yet as it was a large municipality, containing streets as distinguished from country roads, and as its township committee was vested with full power over these streets, the township committee came within the meaning of the statute and was the local authority whose consent must be obtained.

And in New York, where the constitution provides that the construction of a street railway shall not be authorized without the consent of "the local authorities having the control of that portion of the street or highway" sought to be occupied, it was held¹ that the commissioners of highways were the local authorities having control over a bridge, although the village trustees had the power to make and repair the same.

In Pennsylvania it has been held² that the supervisors of the township are the proper "local authorities" to give the consent required.

In New Jersey, where a statute required the consent of the "governing body" of the township, and an earlier statute provided that a street railway might be constructed with the consent of the body having control of streets or highways, it was held that a company which had obtained the consent of the body having exclusive control of the streets must also obtain the consent of the governing body of the township.³

§ 57. Local authorities and county bridges.—It has been held that the city council is not the local authority whose consent is required for laying a street railway track upon a county bridge within the limits of the city under a statute of Pennsylvania of May 14, 1889. And also that the county commissioners have no power to grant to street railway companies the right to lay tracks upon county bridges. The commissioners are bound to keep the bridges in good order and repair, without obstruction of any kind.⁴ In a case in New Jersey it was

¹ *Wheatfield (Town of) v. Tonawanda St. Ry. Co.*, 36 N. Y. Supp. 744.

² *Penn. R. R. Co. v. Montgomery Co. Pass. R. Co.*, 3 Pa. Dist. Ct. R. 58; S. C., 167 Pa. St. 62, 5 Am. El. Cas. 166.

³ *Bergen Traction Co. v. Ridgfield*, 32 Atl. Rep. 754. As to township com-

mittees, see *West Jersey Traction Co. v. Camden Horse R. R. Co.*, 53 N. J. Eq. 163-171.

⁴ *Venango County Com'rs v. Oil City St. Ry. Co.*, 3 Pa. Dist. Ct. Rep. 546 (1894). See also *Larue v. Oil City Ry. Co. (Pa. St.)*, 32 Atl. Rep. 977;

held that the consent of the county board of chosen freeholders is necessary to authorize an electric railway company to use a county bridge within the limits of a city, and also that such consent would be of no avail if it appeared that the board had taken action without inquiring whether such use of the bridge would be dangerous and impair the safety of public travel.¹ The consent must be given by the body regularly convened and organized, after conference and deliberation, and upon due notice to the public and to persons interested.²

§ 58. **How municipal consent may be given.**—If the statute requiring the municipal consent specifies how the consent shall be given, the mode prescribed must be followed. If the statute gives the municipality authority to exercise certain powers by ordinance, a resolution will not be sufficient.³ Certain formalities with respect to time and notice are required for the passage of an ordinance, and to permit an act to be done by resolution is to dispense with these formalities, and the courts, therefore, will not allow common councils to act by resolution when an ordinance is required by the charter or statute. As a general rule, if a statute merely requires the consent of the common council, and is silent as to the mode in which it shall be given, a resolution is sufficient;⁴ and in the case of *Halsey v. Rapid Transit Street Ry. Co.*, already referred to, it was held by the vice-chancellor that where the statute

Lawrence County v. New Castle Elect. St. Ry. Co., 8 Pa. Super. Ct. 313, 43 W. N. C. 76 (1898).

¹*State, Lewis v. Freeholders of Cumberland*, 56 N. J. L. 416, 4 Am. El. Cas. 48 (1894).

²*Union St. Ry. Co. v. Hazleton & North Side Elect. Ry. Co.*, 3 Pa. Dist. Ct. Rep. 784 (1894); *Penn. R. R. Co. v. Montgomery Co. Pass. Ry. Co.*, 167 Pa. St. 62, 5 Am. El. Cas. 166 (1895); *Camden Horse R. R. Co. v. West Jersey Traction Co.*, 52 N. J. Eq. 452, 29 Atl. Rep. 333, 53 N. J. Eq. 163, 58 N. J. L. 102, 32 Atl. Rep. 72.

³*Dill Mun. Corp.* (4th ed.), § 307 and notes; *State, Van Vorst v. Jersey City*, 3 Dutch. (27 N. J. L.) 493; *State, Gleason v. Bergen*, 33 N. J. L. 72; *State, Hoboken L. & I. Co. v. Hobo-*

ken, 35 N. J. L. 205; *State, Story v. Bayonne*, 35 N. J. L. 335; *State v. Paterson*, 45 N. J. L. 267; *State, Hunt v. Lambertville*, 45 N. J. L. 279; *State, Paterson v. Barnett*, 45 N. J. L. 62. See, however, *Sower v. Philadelphia*, 35 Pa. St. 231, where a resolution was held to be in fact equivalent to an ordinance.

⁴*Dill Mun. Corp.* (4th ed.), § 307 and notes; *Bigelow v. Perth Amboy*, 1 Dutch. (25 N. J. L.) 297; *State v. Jersey City*, 3 Dutch. (27 N. J. L.) 493; *Green v. Cape May*, 41 N. J. L. 45; *Burlington v. Dennison*, 42 N. J. L. 165; *Butler v. Passaic*, 44 N. J. L. 171; *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380; *Babcock v. Scranton Traction Co. (Pa.)*, 1 Lack. Leg. News, 223.

provided that, with the consent of the common council, street railway companies might use electric motors, this consent was properly given by resolution;¹ but the better opinion seems to be, and it was distinctly held by the supreme court in New Jersey with reference to this same resolution, that where the power conferred by the charter is the power to pass ordinances for regulating streets, the consent to putting up poles and wires for electric railways must be given by ordinance, because the consent is in fact a regulation of the streets.² The same thing had already been decided in regard to the consent to laying gas pipes.³

§ 59. The same — Application for municipal consent or for a designation of the streets.— The statutes ordinarily provide for the manner in which application shall be made for the consent of the local authorities or for a designation of the route of a line of electric wires. The provisions of the local statutes must of course be observed. The granting of the consent often affects the interests of property owners or private companies, and in such cases due notice of the application should be given. Private property, of course, cannot be taken without compensation, and I refer not to the notice to be given for this purpose, but to the public notice required in matters affecting the interests of property owners and citizens generally. Whenever the statute declares that permission to use the highway or to locate tracks or lines of wires shall be given upon notice, then the notice required must be given before the municipality can grant a valid consent.

In a case in the supreme court of New Jersey⁴ it was held that the permission to construct and operate an electric street railway on the streets of a city in which another company had the privilege of laying tracks could only be granted after giving notice by publication to all persons interested in the manner required by the statute and allowing an opportunity for them

¹ In Illinois and Iowa, where cities have power to grant the right to lay railroad tracks in the streets, it has been held that permission may be given by resolution. *Quincy v. C. B. & Q. R. R. Co.*, 92 Ill. 21; *Merchants' Union Barb Wire Co. v. C. B. & Q. R. R. Co.*, 70 Iowa, 105.

² *State, Halsey pros., v. Newark Pass. Ry. Co.* (N. J. Sup. Ct., January, 1892), 15 N. J. L. J. 45.

³ *Peoples' Gaslight Co. v. Jersey City*, 46 N. J. L. 297.

⁴ *Camden Horse R. R. Co. v. West Jersey Traction Co.*, 58 N. J. L. 102, 32 Atl. Rep. 72.

to be heard; and an ordinance which was given its first reading before the proper publication of the notice, and its second and final readings without a hearing of the persons interested, must be set aside; and it was held that it was necessary that notice be given before the ordinance is taken up, and that the hearing on the ordinance must be expressly adjourned from one meeting to another in order that valid action may be taken at the subsequent meeting, in the absence of the parties interested.¹

In a later case it was held that when the governing body has received the petition at a regular meeting, and has designated a time and place for the hearing, and notice is given and the consents of the land-owners have been filed as required by the act of April 21, 1896, the ordinance granting the permission may be passed at the time designated or at any subsequent time to which the hearing may be adjourned.²

When the statute provides that public notice shall be given, but fails to specify when and how the hearing shall be had, the regulation of these matters is left to the discretion of the municipal authorities.³

In New Jersey a distinction was taken between the consent to the building of the line and the consent to the location of the tracks, and it was suggested that the location of the tracks was a subsequent matter; and it was held that under the statute relating to traction companies, the location of the tracks must be made definitely by the municipal council, which must determine by resolution or ordinance how many tracks there may be, and in what part of the street they shall be laid, and must not leave this to the officers of the company.⁴

¹See also *Avon-by-the-Sea Land & I. Co. v. Neptune City*, 57 N. J. L. 362, 701, 30 Atl. Rep. 529.

²*Hutchinson v. Borough of Belmar* (N. J. L.), 39 Atl. Rep. 643 (1898). In this case various questions arising under this statute are discussed.

³*Secor v. Pelham Manor*, 39 N. Y. Supp. 993. It is held in this case that under the New York statute publication of fourteen days' notice may be made in a weekly newspaper in a village where no daily paper is

published. With respect to the requirements of the New York statute (Laws of 1896, ch. 649) with regard to granting leave to construct a street railway, see *In re Buffalo Traction Co.*, 49 N. Y. Supp. 1052, 25 App. Div. 447 (1898).

⁴*State, Theberath v. Newark*, 57 N. J. L. 309, 30 Atl. Rep. 528 (1895); *West Jersey Traction Co. v. Camden Horse R. R. Co.*, 53 N. J. Eq. 163, 35 Atl. Rep. 49 (1895).

CHAPTER V.

POLES AND WIRES AS AN OBSTRUCTION OF THE HIGHWAY— HOW FAR JUSTIFIED BY GRANT OF FRANCHISE.

§ 60. Poles erected in the streets without legislative sanction are nuisances.— Assuming that posts and wires have been set up in the street under legislative sanction and with the consent of the local authorities, the question remains how far this permission will justify the person maintaining them, in case an injury is caused by the mere presence of the post in the highway. The question of negligent construction or use is a different matter, and will be considered later.¹ The question now is how far the mere obstruction, such as it is, is justified by the permission to make it.

Posts erected in a highway without the authority of law, or at least of ancient custom, are nuisances, and may be enjoined by any one suffering a special injury, or they may be abated, and those who set them up or maintain them are subject to indictment.²

In an old English case,³ on an indictment for erecting tele-

¹ Ch. XV.

² An unauthorized construction of a railroad in a street is a public nuisance, but that which is legally authorized cannot be a nuisance. *Davis v. Mayor of New York*, 14 N. Y. 506; *Wetmore v. Story*, 22 Barb. 414; *Milbau v. Sharp*, 15 Barb. 193; *Drake v. Hudson River R. R. Co.*, 7 Barb. 508; *MacFarland v. Orange & Newark Horse Car R. R. Co.*, 13 N. J. Eq. (2 Beas.) 17. See also *Arbenz v. Wheeling & Harrisburg R. R. Co.*, 5 L. R. A. 371, and note citing cases; *Randle v. Pacific R. R. Co.*, 65 Mo. 362; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 5 W. Rep. 893. Consult ch. XV. *Elliott on Roads*, ch. 24; *Addison on Torts*, § 313; *Dillon on Mun. Corp.*, § 698 (4th ed.). See also, as to tele-

graph lines, *Gay v. Mutual Union Telegr. Co.*, 22 Mo. App. 485; *Irwin v. Great South Telegr. Co.*, 37 La. Ann. 63; *Julia Building Ass'n v. Bell Teleph. Co.*, 88 Mo. 258; *Hewett v. West. Union Telegr. Co.*, 4 Mackay (D. C.), 424 (1886).

³ *Regina v. United Kingdom Elect. Telegr. Co.*, 9 Cox Cr. Cas. 137-174, quoted in *Redfield on Carriers*, sec. 574, note; reported also in 6 *Law Times Rep. (N. S.)* 378; 31 *Law Jour. (Magist. Cas.)* 166; 13 *Fost. & Finl.* 73; 8 *Jur. (N. S.)* 1153; 10 *Wkly. Rep.* 538.

In an early case in England an injunction against maintaining wires in tubes in the highway was refused until the question of the right to maintain them had been settled at

graph poles in the highway, the court maintained the right of the public to the whole road, and said the pole was a nuisance, although it was not in the metaled portion of the road nor in the footpath. The construction of the line had been authorized by the board of guardians, but it did not appear that it was sanctioned by act of parliament. This fact is not mentioned in the report, but, except on this supposition, the ruling is not in harmony with the American decisions.

§ 61. Poles set up with express legislative sanction are not nuisances.—The legislature has the right to authorize the obstruction of a street in any way it may please, subject only to making compensation for injury to rights of private property, and an obstruction expressly and specifically authorized by the legislature cannot be illegal nor amount to a public nuisance.¹

If poles have been set up under legislative sanction and under the direction of the municipal authorities, they cannot afterwards be declared by those authorities to be nuisances. "The power to remove obstructions from the streets," says Mr. Justice Reed in a case in New Jersey,² "is confined to nuisances, and any object which has a legal right in the street is beyond the power of the common council." And it was held by the supreme court in that case that a common council cannot revoke the designation of the streets once made under a statute providing for the construction of a telephone line.³

In *Commonwealth v. Boston*,⁴ municipal officers undertook to remove telegraph poles on the ground that they were so located as to cause inconvenience to the public. It was held that the specifications and decisions of the mayor and aldermen, made and recorded in accordance with General Statutes, chapter 64,

law. Attorney-General v. United Kingdom Elect. Teleg. Co., Rolls Court, Sir John Romilly, M. R., Nov., 1861, 30 Beav. 287, 8 Jur. (N. S.) 533, 31 L. J. (Ch.) 329, 10 Wkly. Rep. 167.

¹ See cases cited in note 2, § 60; New York Teleph. Co. v. Keesey, 5 Pa. Dist. Rep. 366; Brown v. S. W. Telegr. & Teleph. Co. (Texas Civil Appeals), 44 S. W. Rep. 59 (1897); Poole v. Falls Road Elect. Ry. Co. (Md.), 41 Atl. Rep. 1069 (1893). A

city ratifying the action of its mayor in having wires torn down from where they had a right to be is liable in damages. Commercial Elect. Light & P. Co. v. Tacoma (Wash.), 55 Pac. Rep. 219 (1898).

² Hudson Teleph. Co. v. Jersey City, 49 N. J. L. 303-307 (1887). See also chs. III, XV.

³ See ch. III, §§ 42-45, Revocation of Franchise.

⁴ 97 Mass. 555 (1867).

section 3, determining the kind of poles and their location in the highway, were conclusive upon the rightfulness of their erection, so that they could not lawfully be removed by the town or municipal officers, or be treated as a nuisance.

So also in *Young v. Yarmouth*¹ it was held in Massachusetts that where a statute authorized the construction of a telegraph line, and the poles had been located in pursuance of the act by the selectmen of the town, the decision of these officers was conclusive and was a complete justification of the town in an action against it for injuries arising out of an alleged obstruction of the highway.

§ 62. General authority does not authorize dangerous obstructions.—Although an obstruction expressly authorized by the legislature cannot be regarded as a nuisance, yet it is usual to make the privilege of using the streets for telegraph and electric-light lines expressly subject to the condition that the poles shall be so placed as not to interfere with public travel; and the courts are inclined to construe all such grants as subject to the implied condition that the poles shall not be so located as to be dangerous.

But it has been held that even though there be a general authority to set up a line of posts and wires, the question whether a post in the highway is dangerous to travelers may be left to a jury to determine in an action for damages caused by a collision with a horse and wagon.² The court said that a plea of license from the municipal authorities under legislative power was not good, and that the validity of the ordinance was subject to the judgment of the jury on the question whether the pole as located was dangerous to travelers on the street. Where, however, in a complaint claiming damages to a horse and wagon which ran into a telegraph pole,³ it appeared that the poles were placed as near the fence as they could be put without having the cross-arms encroach upon private prop-

¹ 9 Gray, 336.

² *Wolfe v. Erie Teleg. & Teleph. Co.*, 33 Fed. Rep. 320.

³ *Roberts v. Wisconsin Teleg. Co.* (Wis.), 46 N. W. Rep. 800.

See also *People v. Mutual Teleg. Co.*, New York supreme court at circuit, reported in N. Y. Daily Register

for March 19, 1883, where, in an action to remove telegraph poles from a street in which their erection had been authorized by law, the only question left to the jury was whether the poles were of such a character as to interfere with the public use of the street.

erty, and that although they were along the level highway without a ditch between, yet there were three traveled tracks, and the poles were set so as not to be an obstruction, it was held on demurrer that no cause of action had been set out, and that the question need not be left to the jury.

With respect to electric railway poles, Judge Dixon, of the supreme court of New Jersey, charged a jury in a case at the Passaic circuit¹ that although the location of the poles along the middle of a street had been designated by the city authorities under a statute authorizing the use of electric motors, yet this was a mere permission to the company, and it was not obliged to use poles at all, and, if it did so, it remained subject to the duty to exercise due care toward the traveling public; and if the pole was so located with reference to a passing car as to be dangerous to one attempting to enter the car, and such a person, exercising due care on his part, was injured, the company was liable.

In a case in New York² it was held that the right of a telegraph company to use the highway for constructing, operating and removing its line is subject to the use of the road by the traveling public. The telegraph company has no right to use the highway so as to obstruct it and make it dangerous for public travel. The court said the evidence was sufficient to justify submitting the case to the jury on the question of the wrongful obstruction of the highway.

§ 63. Redress—Public and private.—The obstruction of the highway by telegraph poles is justified only so far as it is authorized by law, and, if the extent of the obstruction exceeds the authority given, the poles may be treated as nuisances, and redress may be had by indictment, by suit at law or bill in equity, and city officers may even exercise the power of abatement. In a case in the supreme court of New York³ it was held that the people might maintain an action for dam-

¹ Kowalski v. Newark Pass. Ry. Co., 15 N. J. Law Jour. 50 (February, 1892). statute authorizing the use of electric motors (1892).

Judge Dixon was one of the judges that decided *State, Green v. Trenton*, and *State, Halsey v. Newark Pass. Ry. Co.*, referred to in chapter II, holding that electric railway poles were an obstruction of the street and were not justified by the

² *Staring v. West. Un. Tel. Co.*, 34 N. Y. St. Rep. 508, 11 N. Y. Supp. 817, 3 Am. El. Cas. 474 (1890).

³ *People v. Metropolitan Teleph. Co.*, 31 Hun, 596, 64 How. Pr. 120, 1 Am. El. Cas. 604 (1884).

ages and for an injunction against telegraph poles erected along the sidewalk and alleged to be higher and larger than were authorized; but the jury having found a verdict for only six cents damages, the court said it could not declare any particular pole to be a nuisance, and refused to order any of them to be removed. The statute in that case contained the provisions commonly found in statutes authorizing the construction of telegraph lines. It restricted the erection of poles to such as were necessary to the business of the company, and provided that they should be so constructed as not to incommode the public in the use of the street. It was held that the company was not limited to the use of poles no larger or higher than absolutely necessary, but that they had the right to use such as were reasonably sufficient and proper, if they were so constructed as not to incommode the public in the use of the street or sidewalk; and the court said that to the extent to which the poles so constructed were reasonably necessary, they were authorized by the statute; but that to the extent to which they went beyond that in height or size or number they were illegal, and were the subject of redress in the action.¹

Even if a pole or wire be unauthorized and be a public nuisance, it cannot be cut down by a private individual, unless it interferes with his right of passage along the highway.²

Nor can an individual maintain an action to abate such a nuisance, nor to have the creation or maintenance of it restrained by injunction, unless he has some peculiar interest in the matter distinct from that of the public at large — some right of property which is affected thereby.³ In a case in New York, in 1889,⁴ it was held that the commissioner of public works had the right to remove from the streets electric-light wires which

¹ For a further discussion of Poles and Wires as an Obstruction, see ch. XV.

² *Electric Construction Co. v. Hefernan*, 34 N. Y. St. Rep. 436, 58 Hun, 605, 3 Am. El. Cas. 207 (1890).

³ *Nutley Water Works v. Township of Franklin*, 53 N. J. Eq. 601 (1895); *Borden v. Atlantic Highlands*, etc. Ry. Co. (N. J. Eq.), 33 Atl. Rep. 276,

5 Am. El. Cas. 179 (1895); *Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co.*, 3 Am. El. Cas. 236-265; *Commonwealth v. Westchester*, 9 Pa. Co. Ct. Rep. 542, 3 Am. El. Cas. 326. See, however, *Thomas v. Inter-County St. Ry. Co.*, 167 Pa. St. 120, 3 Am. El. Cas. 175.

⁴ *United States Illuminating Co. v. Grant*, 55 Hun, 222, 3 Am. El. Cas. 95.

had become dangerous to the people, and that he was justified in that case in doing it without notice.

§ 64. **Obstruction to ordinary and extraordinary use of the street — Cases relating to moving a house.**— In *Telegraph Co. v. Wilt*,¹ decided in 1852, it was held that legislative authority and municipal license to set up a telegraph line in the street were no defense in an action for an injury to a house being moved along the street and caught by the wires. Scott and Jarnagin disapprove of this decision, and suggest that the moving of a house was not an ordinary use of the street nor one that could lawfully be made without special license.² With this agrees the opinion of Judge Depue of the New Jersey supreme court in charging the jury in a case in the Essex circuit court, April 30, 1888.³ Telephone wires were stretched across the highway in pursuance of the act under which the telephone company was incorporated, and with the consent of the municipal authorities. There was a *proviso* in the charter that the wires should be ~~located as in~~ no way to interfere with the safety or convenience of persons traveling on or over the roads or highways. There was a statute declaring that the use of a public street "in any of the incorporated cities or towns of this state shall be subject to such regulations and restrictions as may be imposed by the corporate authorities of said cities or towns." The city of Orange had adopted an ordinance declaring that "all telegraphic and telephone wires shall be placed so as to hang not less than twenty feet above the street crossing." The defendant had a special license to move a house along a street, and in moving it he cut all the overhanging wires, and in an action by the telephone company it was insisted on the part of the plaintiff that thirty of these wires were more than twenty feet above the street. The judge charged the jury that the use of a public highway in moving a building was not within the right enjoyable by the public in a public highway for the purpose of travel, and that the defendant's act was not justified on the ground that he was obstructed in the use of the highway for public travel. He held, however, that since the de-

¹ 11 Am. Law Journ. 374 (Feb., 1852), Phila. Dist. Court.

³ New York & New Jersey Teleph. Co. v. Dexheimer, 14 N. J. Law Journ.

² Scott & Jarnagin on Telegraphs, 295 (October, 1891).
§ 53 and note.

fendant had a special license to move the house, he was justified in cutting such wires as were maintained in violation of the city ordinance less than twenty feet above the surface, and left it to the jury to decide whether any of the wires that were cut were more than twenty feet above the roadway, and to assess damages for the cutting of these, and these alone.

In a later case in New Jersey¹ an injunction was granted against cutting a line of street railway wires which formed an obstruction to the moving of a house along the street. The vice-chancellor said the use of the highway for moving a house was in itself an obstruction of the street, and not a use of it for the ordinary purposes of travel, and that the defendant had no right for this purpose to cut the wires and cause a general suspension of traffic on the railroad. And in a case in Illinois it was held that a person moving a house along a highway was not entitled to cut, without compensation, an electric wire strung across the street at the height prescribed by the public authorities.²

¹Millville Traction Co. v. Goodwin, 53 N. J. Eq. 448 (July, 1895), 32 Atl. Rep. 263. ²Dickson v. Kewanee Electric Light & M. Co., 53 Ill. App. 379.

CHAPTER VI.

UNDERGROUND WIRES.

§ 65. Rights of the public and the companies as to putting wires underground.—It has been the general custom in this country to stretch telegraph and other electric wires on poles overhead, but the multiplication of wires in the cities has become such a serious incumbrance upon the streets that there has been a very general public demand that the wires be put underground. This was resisted for a time by the companies, but means have now been discovered of carrying many wires in cables underground without affecting the current by induction, and the losses of overhead wires from wind and snow have been so great that the companies are now desirous of putting their wires underground and out of the way of harm.

Two questions have, therefore, come up for decision: First, can the public require the existing wires to be taken down and put underground? And secondly, have the companies a right to open the streets and put their wires below the surface, and if so, upon what conditions and under what authority?

§ 66. An expensive and difficult work — The municipality cannot require it.—The taking down of existing wires, and putting them in cables underground, involves very serious expense. The wires must be put in tubes and carefully insulated, or must be imbedded in leaden cables. Provision must be made for repairs and for laying down new lines, and every precaution must be taken against induction. It is in fact a reconstruction of the line in a very expensive manner, and only after careful experiment have practicable means been discovered for putting underground the numerous and various wires required for the telegraph, the telephone and the electric railway and electric light. It would seem to follow from the decisions already referred to with regard to overhead wires, that municipal corporations have not the power to order existing lines lawfully put up to be taken down and put underground. It is well settled that wires having been once properly put up

under legislative authority, and with municipal consent, cannot be disturbed by the municipality without authority from the legislature.¹

There is no doubt the legislature may provide that new lines shall only use the streets on condition that they are put beneath the surface, and it may be that unless legislative permission, either express or clearly implied, were given to stretch the wires overhead, a municipality may insist, as a regulation of the use of the streets, that the wires should be put underground.²

§ 67. Usually provided for by statutes—English statutes referred to.—The matter, however, is so important, and the relations of the parties are so difficult, that it is usual to make special and careful provision by act of the legislature for the construction and control of underground cables and of subways for electric wires.

In England underground wires have been used for a long time, and some of the earliest cases on the use of the streets for the telegraph related to the title to the soil below the surface, and to the digging up of public roads for the purposes of a telegraph company.³

The whole subject is now carefully regulated by the statutes 45 and 46 Vict., chapter 56, called the Electric Lighting Act (1882), and the Electric Telegraph Act, 53 and 54 Vict., chapter 59, part 2 (1890).⁴ Large powers are given to the board of trade, which is authorized to license from time to time any

¹ *Supra*, ch. III, § 9 *et seq.* See, however, the remarks of Drummond, J., in *Mutual Union Teleg. Co. v. Chicago*, 16 Fed. Rep. 309, quoted in ch. IV, § 47.

² *Laclede Gaslight Co. v. Murphy*, 130 Mo. 10 (1895); *Missouri v. Murphy*, 170 U. S. 78 (1898); *State ex rel. St. Louis Underground Service Co. v. Murphy*, 134 Mo. 548, 568, 6 Am. El. Cas. 64-77 (1896).

³ *Attorney-General v. United Kingdom Elect. Teleg. Co.*, Rolls Court, Nov., 1861, Sir John Romilly, M. R., 30 Beav. 287, 8 Jur. (N. S.) 582, 31 L. J. (Ch.) 329, 10 Wkly. Rep. 167; *Allen's Telegraph Cases*, 172. See also *Regina*

v. United Kingdom Elect. Teleg. Co., 9 Cox Cr. Cas. 174; *Redfield on Carriers*, § 574.

The *European and American Electric Printing Teleg. Co.*, incorporated August 7, 1851, by 14 and 15 Vict., chapter 135, was authorized to lay down and place in any public road, wires, pipes and tubes necessary or convenient for a telegraph.

⁴ The Electric Lighting Act, 1882, 45 and 46 Vict., chapter 56, entitled "An act to facilitate and regulate the supply of electricity for lighting and other purposes in Great Britain and Ireland." *Electric Telegraph Act*, 1890, 53 and 54 Vict., chapter 59.

local authority or any company or person to supply electricity for any public or private person within any area, subject to certain provisions. It is assumed that wires will be placed underground as well as above ground, and provision is made for obtaining the consent of the local authorities to the breaking up of any streets repairable by the local authorities, and it is forbidden to place any electric line above ground, along, over or across any street without the express consent of the local authority, and if any wire is so placed without such consent it may be removed by the local authorities; and even if it has been put up with consent, it may be removed by a court of summary jurisdiction on complaint made, and proof that it is dangerous to the public safety.

The decision of practical questions with regard to the construction of the line may, in case of disagreement, be referred to the railway commissioners, and the case of *Wandsworth District Local Board v. Postmaster-General*, found in the reports of their decisions, illustrates the manner in which such questions are dealt with.¹ A local board, on being applied to by the postmaster-general under section 3 of the Telegraph Act, 1878, for their consent to the placing of telegraph wires and posts upon, along and over streets and roads in their district, refused their consent, except on condition that the wires across or along streets or roads should be underground. This difference, after having been referred to a metropolitan police magistrate, was, in accordance with section 4 of the Telegraph Act, 1878, brought before the railway commissioners. The commissioners decided that overhead wires should be allowed, subject to the following conditions: 1. That all wires shall be of copper. 2. That all poles shall be of iron. 3. That no wire shall be placed over, along or across any road or footway at a less height than thirty feet above such road or footway. 4. That

See also Report of Board of Trade, Parliamentary Papers, 1889, 229. Special Report, 1889, chapter 5771.

Cunynhame on the Law of Electric Lighting (London: Stevens & Sons, 1883), page 295, contains the electric-lighting act of 1882, together with the earlier statutes that are incorporated in it, besides notes and

forms and a short discussion of the principles and the apparatus relating to electric lighting. See also the Law Relating to Electric Lighting, by G. S. Brown and W. Webb (2d ed.), London, 1889, and Will's Law of Electric Lighting, London, 1898.

¹ 4 Nevill & Macnamara, 301, Commissioners' Decisions (1884).

where a wire crosses over any public road or street, the distance between the points of support at either side of such road or street shall not in any case exceed one hundred yards.

The question of cost was considered and the difficulty of having wires placed underground at every street-crossing. There was the testimony of Mr. Graves, the engineer-in-chief of the postoffice telegraphs, that overhead wires would be impracticable if they had to dip at every crossing. The cost of overhead lines was estimated at about one-third of the cost of lines on poles if they were of wood, and one-seventh if they were of iron, while underground work, it was considered, would be thirty times as expensive as lines with wooden poles.

§ 68. English decision under Canadian statute.—Under a Canadian statute authorizing a company to lay its wires underground for the purpose of supplying gas and electricity, and giving the municipal council the right to oversee the work and prescribe the manner in which the streets shall be opened, it was held by the privy council that if the company gives reasonable notice of its intention to exercise its statutory powers, and the city council takes no action, the company is entitled to proceed with the work without interference on the part of the council.¹

§ 69. General provisions of American statutes.—In some of the American states the statutes providing for the telegraph gave permission to lay the wires underground as well as to stretch them on poles. The more recent statutes have made special provision for the removal of overhead wires and putting all the wires in certain large cities in cables or subways, under the control of commissions or boards clothed with special powers and charged with special duties in the matter.

In Connecticut the selectmen of the town are given full direction and control over the placing, erection and maintenance of electric wires, conductors, fixtures and apparatus, including the relocating or removal of the same, and it is provided that every person who shall place any telegraph, telephone or electric light or power fixtures, or structures of any kind, over *or under* any highway or public ground, without the consent of the adjoining proprietors, or the consent of the town commis-

¹ *Montreal v. Standard Light & Power Co.*, [1897] App. Cas. 527.

sioners, shall be fined or imprisoned. (Laws of 1887, ch. 33, Gen. Stat. Conn. 1887, §§ 1477, 3946.)

A statute in Nebraska gives to the mayor and common council of any city having a population of sixty thousand inhabitants or upwards power to prohibit or regulate the erection of telegraph, telephone or electric-light poles in the public grounds, streets or alleys and the placing of wires thereon, and to require the removal from the public grounds, streets or alleys of any or all such poles, and require the removal and placing underground of any or all telegraph, telephone or electric wires. (Gen. Laws of 1887, p. 123, passed March 30, 1887.)

The statutes of many states give municipal authorities power to regulate the putting up and maintenance of telegraph and other wires in the streets.

In Massachusetts it was provided in 1881 that the city council of any city and the selectmen of any town may establish reasonable regulations for the erection and maintenance of all telegraph and telephone lines of wire within their respective cities and towns, and may permit the same to be laid under any public way or square. In cities such regulations shall be made by ordinance.¹ In 1894 an act was passed providing for placing underground all the electric wires, except those of the long-distance telephone and electric railway, within a certain part of the city of Boston, the work to be done gradually and completed before January 1, 1900. The act creates a "department of wires" in the city government, and provides for the appointment of a "commissioner of wires."²

In Michigan permission is given to telegraph companies to run their wires underground, and to telephone companies to place their wires under the streets, provided they do not interfere with other public uses thereof.³

In Vermont the selectmen of the towns may direct any line of wires to be placed underground when it crosses a highway.⁴ In New York a statute passed in 1853⁵ provided for telegraph lines upon, over *or under* any of the public roads, streets, etc.

¹ Acts and Resolves (Mass.), 1880-81, ch. 83, sec. 1.

² Acts and Resolves (Mass.), 1894, ch. 454, §§ 1, 2.

³ How. Ann. Stat., § 3697; How. Ann. Stat. Supp., § 3718*d*.

⁴ Vermont Statutes of 1894, § 4226.

⁵ N. Y. Laws 1853, ch. 471, § 2.

And it is provided by chapter 397 of the acts of 1879, as amended by chapter 483 of the laws of 1881, that telegraph companies incorporated in New York state may lay lines of electrical conductors underground in any city, village or town within the limits of the state, subject to all the provisions of law in reference to such companies not inconsistent with the act; provided, that such company shall first obtain from the common councils of cities, the trustees of villages, or the commissioners of highways or towns (townships), permission to use the streets for the purposes therein set forth. In Kansas¹ and Mississippi² the mayor and common council of cities of the first class are authorized to grant permission to put the wires underground; and in Missouri³ and Ohio⁴ permission is given, provided the consent of the municipality be first obtained. In New Hampshire⁵ permission is given the selectmen to fix the number of the wires and the distance underground. In Tennessee⁶ the companies are given the right to put the wires either overhead or underground in any of the streets of the cities and towns, and the roads and highways of the counties.

In New Jersey, by a supplement passed March 31, 1882,⁷ it was declared that any telegraph company incorporated under the general telegraph act, desiring to construct its lines by means of underground cables containing the wires, instead of poles and posts sustaining the wires, should "be subject to all the restrictions and provisions concerning the use of roads, highways and streets as are provided" in the general telegraph act and its supplements; and on March 14, 1893, by a supplement to the general act concerning corporations,⁸ companies organized for the supply of electric light, heat or power were authorized to lay wires in pipes beneath the public highways under certain restrictions and with the consent of the common council or township committee, and subject to such regulations as might be imposed by them. An act passed March 10, 1892,⁹ providing for the creation of a state board of commissioners of electrical subways, was repealed in 1894.¹⁰

¹ 1 Kan. Gen. Stat., § 22.

² Miss. Ann. Code, § 2933.

³ Mo. Rev. Stat., § 2721.

⁴ Ohio Laws 1894, p. 205.

⁵ N. H. Pub. Stat., ch. 81.

⁶ Acts of Tennessee 1895, ch. 203, sec. 3.

⁷ N. J. Laws 1882, ch. 172; Gen. Stat., p. 241.

⁸ N. J. Laws 1893, ch. 237, p. 412.

⁹ N. J. Laws 1892, ch. 48, p. 78.

¹⁰ N. J. Laws 1894, ch. 7, p. 17. While the act of 1892 was in force, it was held that the permission of this board

In most of the states, however, the statutes giving authority to use the streets for electric wires refer to the use of posts, poles and abutments, and give power to construct lines "along" or "upon and along" any public highway, or to erect posts "along" or "upon and along" the road, and string wires therefrom.¹

§ 70. Decisions thereunder.—It has been held in Ohio² that under a statute authorizing telegraph lines to be constructed "from point to point along and upon any public road, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires in such manner as not to incommode the public in the use of the streets," the company is not restricted to the use of overhead wires, and that the municipality, in the exercise of its power of regulating the streets, might agree with the company for the construction of an underground system. The municipality having failed to agree with the company, it was held that under the statute in Ohio the probate court had power to

was not sufficient, without the consent of the local authorities, to give permission to set up a line of wires in the streets. *Trustees v. Subways Com'rs*, 55 N. J. L. 436, 27 Atl. Rep. 809, 4 Am. El. Cas. 135.

¹See, for example: Louisiana, 1876, § 3760; Acts of 1880, No. 124, amending § 690 of the Rev. Stat.; Minnesota, 1891, § 2632; Dakota, 1887, § 3025; Illinois, Rev. Stat. 1874, p. 1471; Laws of 1883, p. 173; Nebraska, Laws of 1887, p. 634; New Jersey, Laws of 1887, p. 119; 1888, p. 546; Supp. Rev., p. 1022; Rev., p. 1174; Pennsylvania, General Incorporation Act of 1874, § 33, Laws of 1885, p. 164; Vermont, Rev. Laws of 1880, p. 702; Virginia, Code of 1887, § 1287; United States, Rev. Stat., § 5263; Alabama, Code of 1876, § 1932; Arkansas, Rev. Stats. 1874, § 5724; California, Act of April 22, 1850; Colorado, Gen. Laws 1877, § 99; Florida, Gen. Laws, ch. 782, § 2; Iowa, Code of 1873, § 1324; Laws of 1883, ch. 104; Kansas, Laws of 1868, Act Concerning Private Corpora-

tions, §§ 74, 78; Maryland, Rev. Code 1878, § 130; Michigan, Stat. of 1871, ch. 80, § 5; Mississippi, Code, art. 6, § 2430; New York, Laws of 1848, ch. 265, § 5; Oregon, Gen. Laws of 1872, ch. 58, § 1; Utah, Compiled Laws of 1886, title XI, ch. 1, § 4.

For collections of the laws of the American states relating to telegraphs and telephones, see "Laws of the Various States Relating to Telegraph Companies" (there is a copy in the library of the New York Law Institute); "Laws of the United States and the Several States and Canada Relating to Telegraphs," compiled for the Baltimore & Ohio Telegraph Co.; "Railroad and Telegraph Laws of Pennsylvania," 1816-1883, Drinker's Ball, 1884; "Statutes Relating to the Telephone," by John B. Uhle; 28 Am. Law Register (N. S.), 75, 141, 210, 265, 333, 396.

²*Edison General Electric Light Co. v. Cincinnati*, 3 Goebel Probate Court Reports (Ohio), 304 (March 18, 1890).

direct the mode in which the wires underground should be laid in the streets.

In Pennsylvania it has been held that a grant to a telephone company to run and maintain wires "over and through" the streets does not include permission to lay them underground;¹ but an ordinance requiring them to be put underground having been accepted and acted upon, it was held that the power to impose conditions was gone and only the power of regulation remained. In another case in the same state it was held that, under the general act requiring cities of the third class to keep the streets in repair and free from encroachments, they have the power to construct conduits to accommodate all the electric wires which have been suspended over the streets.²

Whether or not the company, under its charter or the general statutes, has the right to put its wires underground, it is well settled that this right is subject to the reasonable control of the municipal authority under its police power and the power to regulate streets. Referring to a case arising in the city of St. Louis, Chief Justice Fuller said:³ "Considering the danger to life and property from electric wires when charged, it seemed to the court too plain for argument that the city should have the right to direct the manner in which their use should be exercised, and especially when more than one method was open and the rights and safety of the public were more or less affected by either. Again, many companies used electric wires for various purposes, and to accommodate them all and prevent monopolies in the use of the streets, it appeared absolutely necessary that the municipal authorities should have the right to direct the manner in which the wires should be placed underground."⁴

¹ *Commonwealth v. Warwick*, 185 Pa. St. 623 (1898), 40 Atl. Rep. 93, in which the powers of the executive department and the councils in Philadelphia with respect to the construction of an underground service and terminal poles are considered.

² *O'Brien v. Erie*, 20 Pa. Co. Ct. Rep. 337, 7 Pa. Dist. Rep. 491 (1898).

³ *Missouri v. Murphy*, 170 U. S. 78 (1898), affirming *Laclede Gaslight Co. v. Murphy*, 130 Mo. 10 (1895).

⁴ See also *Eureka Light & Ice Co. v. Eureka*, 5 Kan. App. 609, 48 Pac. Rep. 935; *Arnold v. Price*, 19 R. I. 437, 35 Atl. Rep. 526; *Smith v. Westerly*, *ibid.*; *San Antonio & A. P. Ry. Co. v. Bergsland*, 12 Tex. Civ. App. 97, 34 S. W. Rep. 155.

§ 71. The legislation in New York providing for a board of electrical control and a subway company.— In New York the telegraph act of 1848 (ch. 265) provided for the construction of lines along and upon any of the public roads and highways. This was amended in 1853 (ch. 471) so as to authorize the construction of a line under as well as over a road. In 1884 an act was passed (ch. 534) by which it was provided that all telegraph, telephone and electric-light wires and cables in all cities of the state having a population of five hundred thousand or over should thereafter “be placed under the surface of the streets, lanes and avenues” of the city, and that this should be done before the 1st day of November, 1885. It was further provided that in case the owners of the wires should fail to comply with the act within the time specified, the local governments should remove without delay all such wires, cables and poles. In 1885 an act was passed (ch. 499) which provided for the appointment of a board of commissioners of electrical subways, and it was made the duty of this board to cause to be removed from the surface of the streets and to be maintained underground, wherever practicable, all electrical wires and cables, and the subways were required to be built under the supervision of the board, and no electrical wires were to be allowed above the surface of the streets without the permission of the board. This board made a contract with a company, providing that the company should construct the necessary subways, subject to the approval of the commissioners, and that all corporations owning and operating electrical wires above the streets should have the right to place them in the subways upon the terms and under the conditions specified. This contract was ratified by an act of the legislature in 1887 (Laws, ch. 716).

§ 72. Decisions thereon.— This legislation has been held to be a valid exercise of the police power. Injunctions against removing the wires have been denied, and in an action for damages for cutting the wires the New York court of appeals ordered judgment to be entered for the defendant.

The question came before Judge Wallace, of the United States circuit court for the southern district of New York,¹ and he

¹ *Western Union Teleg. Co. v. New York*, 33 Fed. Rep. 552, 2 Am. El. Cas. 195 (1889).

held that the act of 1884 was a valid police regulation, even as to a telegraph company engaged in interstate commerce which had accepted the provisions of the act of congress of July 24, 1866,¹ and which thereby became, as to government business, a government agency, and also that the act of 1887 was good as a police regulation, even though it gave special privileges to the subway company. And he denied an injunction against cutting down telegraph wires left hanging over the streets after notice to place them in the subways, but as to wires along the line of the elevated railroad, which was a post-road of the United States, he said it was doubtful whether the statutes were lawful to the extent of depriving the plaintiff of the use of such a road, and he granted an injunction.

The subject came up before the state courts of New York in several cases. In *People v. Squire*² the court of appeals decided that the act of 1884 was not unconstitutional, and was a proper exercise of the power to regulate streets. The court said that in great cities there were many public uses to which the streets were necessarily put,—that they must be used for sewers, gas pipes, steam pipes, telegraph and electric wires, and that it was competent and proper for the legislature to distribute the space for the various uses, so that all should best serve the public convenience, and that in the exercise of this power it was reasonable to require the electric wires to be placed in subways under the control of a neutral board, which should determine how and where the various kinds of wires should be laid. This decision was affirmed by the supreme court of the United States, and the court said that the statutes of 1885 and 1886 giving control to the board of commissioners of electrical subways did not impair the obligation of the existing contract with the city, and were a constitutional exercise of the general police powers of the state.³

This decision was followed in two cases in the supreme court of New York,⁴ and the question came again before the

¹ U. S. Rev. Stat., § 5263. See first section of chapter XII, *infra*.

² *People ex rel. N. Y. Electric Lines Co. v. Squire*, Com'r, 107 N. Y. 593 (1888), 14 N. E. Rep. 830, affirming 14 Daly, 154, 2 Am. El. Cas. 170.

³ 145 U. S. 175, 4 Am. El. Cas. 122.

⁴ *U. S. Illuminating Co. v. Hess*, 3 N. Y. Supp. 777, 19 N. Y. St. Rep. 883, 2 Am. El. Cas. 187; *U. S. Illuminating Co. v. Grant*, 7 N. Y. Supp. 788, 55 Hun, 222, 3 Am. El. Cas. 95. See also *East River Electric Light Co. v. Grant*, 25 Jones & S. (57 N. Y. Su-

court of appeals in *American Rapid Telegraph Co. v. Hess*, decided February 24, 1891.¹ The plaintiff, a telegraph company organized under the telegraph acts of 1848 and 1853, had constructed lines in the streets of the city of New York without any special grant or authority from the city. The plaintiff claimed that these acts operated as a grant to it of a franchise to use the streets, which constituted an inviolable contract under the protection of the constitution of the United States, so that neither the state nor the city could cause the poles and wires to be removed without making compensation. The court held that the statute did not grant the plaintiff any interest in the streets, but only conferred upon it an authority or license to enter upon the streets and use them for a public use—one of the purposes for which the public streets could be used—not inconsistent with the use for general street purposes, and that these acts of the legislature were general public legislative acts in the exercise of the police power of the state, and therefore they were not beyond the reach of future legislation. The court said, moreover, that even if they were a grant of some sort of a franchise, yet the state did not abdicate its power over the public streets, nor in any way curtail its police power, nor absolve itself from the duty of maintaining the streets and highway of the state in a safe and proper condition for public travel, and they held that the order to remove the poles and wires and put the wires in the subways, after due notice, was a proper and reasonable exercise of the control over streets, and that the cutting down the wires, after failure to comply with the notice, was not a taking of property for public use, but simply a removal of it after it had become a nuisance. The court said, also, that the authority to remove the wires could be found in the proviso in the act of 1848 under which they were erected, namely, that they should not be so constructed as to incommode the public use of the highways. The legislature, having determined that they do obstruct the public use of the streets, has a right to direct them to be put

perior Court) 553, 9 N. Y. Supp. 317,
3 Am. El. Cas. 127.

¹ 125 N. Y. 641, 26 N. E. Rep. 919,
3 Am. El. Cas. 142, 10 Ry. & Corp. L.
J. 117, affirming 12 N. Y. Supp. 536,

58 Hun, 610, 35 N. Y. St. Rep. 606.
See also *Armstrong v. Grant*, 31 N. Y.
St. Rep. 248, 9 N. Y. Supp. 388, 50
Hun, 220.

beneath the surface. The telegraph company insisted that under the act of congress of July 24, 1866, Revised Statutes, section 5263, they were entitled to use the post-roads of the United States, and that under section 3964, and the act of March 1, 1884, all letter-carriers' routes and all public roads and highways were post-roads; but the court held that these acts of congress could not deprive the state of its control of its highways, and its right to regulate them under the police power, and that the laws of congress are perfectly satisfied by permission to place the wires in the subway.

§ 72a. Limitations of the powers of the subway companies. It has been held, however, that under the subway statutes of New York the subway company does not acquire an exclusive right to maintain subways for electric wires in any of the streets.¹ In the construction of a street-car cable line provision was made for an electric wire underground for the purpose of sending signals. The court held that the subway company had no right, either by statute or by contract, to require this line to be put in their subway and that they were not entitled to an injunction.²

In Missouri it has been held that the city of St. Louis, which possesses unusual powers, cannot make a valid grant to a private company of the right to maintain subways in the streets for fifty years without reserving the power of supervision and control of the location, construction and use of the line. Although the subways were intended to be used by telegraph and telephone companies for public uses, yet the subways themselves were granted to a private company which was under no obligation to put them to a public use; and the city did not, like the state, retain by implication the control of the lines of wire, and it could not, without an express reservation of such power, make a grant which was in effect a grant of a private use and one that was thus put beyond municipal control. It was held incidentally in these cases that the city of St. Louis had power to permit, and, if public safety required it, to compel, telegraph and other wires to be put underground.³

¹ *Empire City Subway Co. v. Broadway, etc. R. R. Co.*, 87 Hun, 279, 56 Am. El. Cas. 66 (1895).
² *State ex rel. St. Louis Under-*

ground Service Co. v. Murphy (Mo.), 6 Am. El. Cas. 64 (1895); 134 Mo. 548, 6 Am. El. Cas. 77 (1896).

³ A city having given a telegraph

§ 73. Relation of the electric-wire companies to the subway companies.—The relation of the electric-wire companies to the subway companies was considered in a case in New York under the subway legislation above referred to.¹ An electric-light company, having notice of the scale of charges fixed by the subway company and approved by the board of electrical control, applied for leave to put its wires in the subway, and it was granted. Having kept the wires there several years without paying any rent, and having received notice to remove them, the electric-light company filed a bill insisting that the rents charged were unreasonable, asking the court to fix a fair rent and in the meantime to enjoin the removal of the wires. The relief was refused by Judge Ingraham, and the decision was affirmed by the general term. The court reviewed the statute and said the electric-light company could not take possession of the subways, with notice of the rent charged, without becoming liable to pay that rent, and that, if the rent was considered unreasonable, application to reduce it should be made to the board of electrical control. The decision of the board is final, in the absence of fraud, except upon the proceedings for *mandamus* provided for in the statute, and it is doubtful whether equity can, in any case, interfere; but certainly no injunction can be granted or relief given so long as the rent already accrued remains unpaid.

Another case on the relation of the companies owning the wires to the companies having the subways² decides that a company whose wires have been placed in existing subways has no right by statute (and in the present case none by agreement) to restrain the transfer of the subways to another company, nor to have an injunction against the board of electrical control to prevent it from making a contract for such a transfer.

company the right to lay wires in a subway, another company having a subsequent contract with the city was enjoined from building a subway over that of the plaintiff. *West. Union Tel. Co. v. Syracuse*, 53 N. Y. Supp. 690, 24 Misc. Rep. 338 (1893).

¹ *Brush Electric Illuminating Co. v.*

Consolidated Telegraph & Electrical Subway Co., 15 N. Y. Supp. 81; S. C. on appeal to the general term, *Id.* 477, 60 Hun, 466, 3 Am. El. Cas. 150.

² *Manhattan Electric Light Co. v. Grant, Mayor of New York*, 31 N. Y. St. Rep. 254, 56 Hun, 642 (N. Y. Supr. Ct., 1890).

CHAPTER VII.

RIGHTS OF THE OWNERS OF ABUTTING LANDS WITH RESPECT TO THE USE OF THE STREETS FOR ELECTRIC WIRES—GENERAL VIEW.

§ 74. **The multiplication of wires in the streets has given rise to controversies with land-owners.**—With the multiplication of electric wires in the streets and along the highways, the question becomes important, both for land-owners and for companies, whether the poles and wires may be placed in the streets without the consent of the owner of the adjoining land, and without compensation made. So long as electric wires were used only for telegraph lines running along country roads and into cities and out again, few controversies arose; and although the telegraph has been in use for more than fifty years, there are few, if any, decisions to be found on this question prior to 1883; but, now that every street and almost every road has a line of many wires, and the wires make almost a network in the centres of the cities, the occasions for controversies have greatly increased, and the inconvenience to the land-owners has become more serious. Added to these is the new use of the wires for the electric street railway, and this has met with determined opposition on the part of the owners and occupiers of lands along the street, and there have been many decisions within the last few years on the question whether the owner of land can make objection to the setting up of poles and wires in an adjoining street for the purpose of propelling street cars by electricity.

§ 75. **The purpose for which the wires are put there is an important element.**—The answer to the question, whether the land-owner has a right to object to the use of wires in the streets, depends on the purpose for which the wires are used, and on the question whether that purpose is a proper use of a street or a road as such. The answer, therefore, may be different with respect to the various uses of the electric wires. It may be

that the electric-light wire, used to supply the means for furnishing the streets as well as the houses with light, is a proper use of the street, auxiliary to the primary purpose for which the street was laid out, and yet that the telegraph wire, strung, it may be, upon the same poles, serves a purpose which has no relation to that for which the street was dedicated or condemned to public use, so that to subject it to this use imposes a new burden, for which the owner of the soil is entitled to new compensation. The telephone wire must, doubtless, be classed with the telegraph wire; but the poles and wires for the electric railway, being used in aid of public travel, may add no new burden to the land in the street, or none in addition to that imposed by the railway itself. For these reasons it will be necessary to consider the various uses of the electric wires separately, after first inquiring what are the rights of the land-owner in the street and what are the ordinary uses to which a street may be put without affecting his rights or requiring his consent.

§ 76. New uses — Different views of the proper use of a street.— The question now is, not what the legislature may authorize the streets to be used for, but what are the uses that may be made without imposing a new burden upon the land, and without changing the use to which a street or highway may be supposed to have been dedicated. The answer to this will, of course, depend upon the breadth of the view taken by the courts of the natural and proper uses of a street by the public.

When land is taken or dedicated for the purposes of a highway, the question, what use may be made of it, depends on what the purposes of a highway are. There is little difficulty in deciding what are the recognized purposes of the street or highway at any given time, but the difficulty arises when, in the course of time, new modes of use are invented, and the question is whether they are within the meaning of the dedication or have been paid for in the compensation already made. Opinions differ on this according as the courts are inclined to construe strictly or liberally the meaning of a dedication or taking of lands for a street. If the public gets only such uses as are known at the time, every change involves a new burden on the land taken; but if the taking is construed to be the ac-

quisition by the public of the use of the land for all the purposes for which a street may reasonably be required, the changes in the mode of use will be regarded as of little consequence so long as the street is used for public purposes not inconsistent with those for which the land was taken.

These two views of the uses of the streets will be found to underlie the decisions on all branches of our present subject, and the difference between them explains the difference in the decisions.

It is useless for me to express my own opinion as to which of these is the better view, and it would be going over fields already reaped to examine the cases in detail. The cases are collected and discussed in all the text-books on eminent domain, streets and highways, and municipal corporations.

§ 77. **Views of Judge Dillon and Mr. Lewis.**—Judge Dillon, in his work on *Municipal Corporations* (4th ed., § 683), says: "The fundamental idea of a street is not only that it is public, but public for all purposes of free and unobstructed passage, which is its chief and primary, though by no means sole, use." And again (§ 656b), after saying that in some cases the fee is in the owner of the adjoining land, and in some cases in the city, he says: "In either case the abutter is entitled as of right, subject to municipal and public regulation, to make any beneficial use of the soil of the street which is consistent with the prior and paramount rights of the public therein for the street purposes proper. The right of the public to use the streets, not only for travel and passage, but for sewer, gas, water and steam pipes, and the like purposes, is, of course, paramount to any proprietary rights of the abutter." So, also, Mr. John Lewis, in his *Treatise on Eminent Domain* (§ 126), says: "In regard to the uses which the public authorities can make, or authorize to be made, of the land acquired for streets, the general rule is that the streets are laid out primarily to accommodate the public in traveling from place to place, and that the right attaches to whatever is necessary or proper to facilitate such travel in the usual and ordinary modes. But while the purpose of streets is primarily for public travel, yet in populous districts it has been the immemorial custom to employ them for other purposes of a public nature, which, though

having little or no connection with the uses or improvement of the street as a highway, are not inconsistent with such use."¹

Mr. Lewis, however, insists that the right of the public in the streets is by ancient usage merely a right of public passage to all the public alike, and that any mode of passage which gives peculiar privileges and cannot be referred to the common right is a new burden upon the land, and that the public right does not properly include the right to lay down gas or water pipes or to lay rails for a railroad of any kind. These views are maintained in a learned note to a case reported in the sixth volume of his *American Railroad and Corporation Reports*.²

§ 78. Distinction with respect to the title in the public and in the abutting owner.—Another matter of difference running through the decisions is the ownership of the fee of the land. A distinction is made between cases in which the fee is owned by the abutter and those in which it is owned by the public, and there are other cases in which that distinction is held to be of little consequence.

As a general rule, upon the condemnation or dedication of a highway, the fee-simple remains in the abutting owner, and the public acquires only an easement.³ This is so in many

¹Streets are not exclusively for travel, but for all the uses to which it is customary to devote them (*Henkel v. Detroit*, 49 Mich. 249); so held by Cooley, J., in a case in which land in a street was condemned for market purposes, and the incidental effect was to block up the street with wagons. The weight of authority, however, is that municipal corporations have not the power to authorize the occupation of a public street for a permanent market. *State v. Laverack*, 36 N. J. L. 201; *Wartman v. Philadelphia*, 33 Pa. St. 202-210; *McDonald v. Newark*, 10 N. J. Law Journal, 84 and note; *S. C.*, 42 N. J. Eq. 136.

For reference to cases on the use of streets in cities and towns, see notes, 8 L. R. A. 828, 9 L. R. A. 100.

²*Rafferty v. Central Traction Co.*, 6 Am. R. R. & Corp. Rep., note, p. 299.

³The general rule laid down by Chancellor Kent is that "a grant of land bounded by a highway or river carries the fee in the highway or river to the centre of it, provided that the grantor owned to the centre and there be no words or specific description to show a contrary intent." 3 Kent's Comm. 434; *Winter v. Peterson*, 4 Zab. (24 N. J. L.) 524; *Hoboken Land & Imp. Co. v. Kerrigan*, 31 N. J. L. 13; *Glasby v. Morris*, 18 N. J. Eq. 72; *Higbee v. C. & A. R. R. Co.*, 20 N. J. Eq. 435, 439; *Salter v. Jonas*, 39 N. J. L. 469; *Boston v. Richardson*, 13 Allen (Mass.), 152, 153; *Bliss v. Ball*, 99 Mass. 597; *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216, 220; *Bissell v. N. Y. Central R. R. Co.*, 23 N. Y. 61; *Elliott on Roads*, 569; *Dill. Mun. Corp.*, § 663.

cases of actual conveyance of the land for the purposes of a highway or street. On the other hand, there are cases in which the fee-simple of the land in the highway never came to the abutting owner, but is held by the municipal corporation, or, in a certain sense, by the public.¹ In either case the street is subject to the public use for the purposes of a street, and the owner of the abutting land has certain special rights therein. If the fee is in the municipality, it is held in trust for the public use and subject to the rights of the abutter. If the fee is in the abutter, he holds it subject to the public use, whatever that may be; and whether the fee is in the city or in the abutting land-owner, he has a right to the use of the street in connection with his property — a right to light and air and access — a privilege of using the street as such in connection with his land; and this right is a right of property of which he cannot be deprived without compensation.

§ 79. In either case there are certain rights in the street as such.—It is generally agreed, however, that whether the legal title is in one or the other, there are certain public rights in the street as a street, and there are special rights of property in the abutting owner in that use.²

The land taken or dedicated for use as streets is subject to the right of the public to have them used as such, and also to the right of the abutter to use them as such in connection with his land.

The general consensus of judicial opinion since the elevated railroad cases have been thoroughly discussed³ seems to be that

¹ As, for example, the Dutch Streets in New York, discussed in some of the elevated railroad cases in New York. *Hine v. N. Y. Elev. R. R. Co.*, 27 N. Y. St. Rep. 303; *Mortimer v. N. Y. Elev. R. R. Co.*, 25 N. Y. St. Rep. 872; *Abendroth v. N. Y. Elev. R. R. Co.*, 54 N. Y. Super. Ct. 417; *S. C. sub nom. Abendroth v. Manhattan R. R. Co.*, 122 N. Y. 1 (1890).

² See *McQuaid v. Portland & Vancouver R. R. Co.*, 18 Oreg. 237, 22 Pac. Rep. 899, 1 Am. R. R. & Corp. Rep. 34, with note; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y.

234; *Selden v. Jacksonville*, 28 Fla. 558; *Page v. Bilvin (Va.)*, 14 S. E. Rep. 849; *Scheible v. Lake Shore & M. S. Ry. Co.*, 10 Ohio Cir. Ct. Rep. 334.

³ *Story v. N. Y. Elev. R. R. Co.*, 90 N. Y. 122; *Lahr v. Met. Elev. R. R. Co.*, 104 N. Y. 263; *Pond v. Met. Elev. R. R. Co.*, 112 N. Y. 186; *Porter v. Met. Elev. R. R. Co.*, 120 N. Y. 284; *Fobes v. Rome & Watertown R. R.*, 121 N. Y. 505; *Hochalter v. Manhattan R. R. Co.*, 31 N. Y. St. Rep. 112; *Giordano v. Manhattan R. R. Co.*, 31 N. Y. St. Rep. 134. See also an article on the elevated railroad litigation

the abutting owner, whether he owns the fee or not, has a substantial right in the street — a right to have it kept for use as a street for access to his property and to afford light and air — and that this is a right of property which cannot be taken from him without compensation.¹

§ 80. Discussion of the subject by Mr. Carman F. Randolph.— The subject is ably handled by Mr. Carman F. Randolph, of the New Jersey bar, in an article on Eminent Domain

by Edward A. Hibbard, 4 Harv. Law Rev. 70 (May, 1890).

¹ Judge Dillon, speaking of the nature of streets and the rights of the owners of abutting land, says (§ 656a): "The full conception of the true nature of a public street in a city, as respects the rights of the public on the one hand and the rights of the adjoining owner on the other, has been slowly evolved from experience. It has only been at a recent period of our legal history that these two distinct rights have separately and in their relations to each other come to be understood and defined with precision." He then proceeds to discuss the whole subject with reference to the use of the streets for various purposes, including gas and water pipes, and sewers, steam railways and horse railways, and devotes two paragraphs to the telegraph and a note to the electric railway. See Dillon, *Mun. Corp.* (4th ed.), ch. XVIII; streets, gas pipes, § 691; water pipes, § 697; sewers, § 699; telegraph poles, §§ 698, 698a, with notes; steam railways, §§ 701-714, 724-727; horse railways, §§ 705-727; elevated railways, §§ 723a-723d; electric railways, note on page 893. The discussion of the subject in the elevated railway cases recently decided in New York is especially interesting and instructive, because it is in these cases that the rights of the land-owner in the use of the street have been maintained without respect to the actual taking of land. See, how-

ever, a much earlier case in New Jersey, in which the land-owner's rights in a highway were clearly expressed. *Barnett v. Johnson*, 15 N. J. Eq. 481; *infra*, ch. VII, § 83.

A distinction was made by Judge Dillon, in his earlier editions, between those cases in which the fee was in the abutter and those in which it was in the public (old, §§ 556 and 557, with cases); and he says in his last edition that he allows these sections to stand (§§ 702 and 703), since they correctly summarized the law as it stood twenty years ago; but he goes on in new sections 704 and 704a to say that "the law has been tending towards an abrogation, in many respects at least, of the distinction that the rights of the abutter on the one hand and of the public on the other are essentially different, whether the bare fee of the street or highway is in one or the other."

The same subject is discussed by Mr. Lewis in chapter V: "What Constitutes a Taking — Streets and Highways." See especially as to railroads in streets, §§ 110-123; elevated railroads, § 123; horse railroads, §§ 124, 125; other uses generally, § 126; sewers and drains, § 127; water pipes, § 128; gas pipes, § 129; steam, electricity, etc., § 130; telegraph and telephone lines, § 131. Judge Elliott discusses the nature of streets in chapter I, and the rights of abutters with respect to uses of various kinds in chapter XXVI, and with respect to street railways in chapter XXIX.

Over Streets, in 12 New Jersey Law Journal, 133.¹ His conclusion is that there is no real difference between cases in which the fee of the soil to the middle of the street is in the owner of the abutting land, and cases in which the fee of the land in the street is in the public. The distinction is taken in many cases, and the decisions are made to turn upon it, but Mr. Randolph, after examining the elevated railroad cases in New York and other late cases, in which the subject is thoroughly considered, suggests that the fee in the owner is subject to an indefinite right of present possession by the public, and cannot have substantial value as property, and that if the fee is held by the state it is held in trust for the people for the purposes of a street, and subject to the right of the owner to the easements of light and air and access, so that in either case the only valuable property of the owner is his easement or right to use the street in connection with his property, and that for damage to this alone need compensation be made upon the construction of any public work for the purpose of transportation. Mr. Randolph was speaking of the taking of streets for railroad purposes, and speaks, therefore, of public works of transportation, but the same principle is applicable to public works of any kind.

§ 81. Same subject — The elevated railroad cases.— The cases he referred to were those of the elevated railroads in the city of New York, which, although they were intended for public travel, affected very seriously the ordinary uses of the streets by the owners of adjoining lands, and interfered with the access and light and air. It was held in these cases that, whether the fee was in the owner or in the city, owners were entitled to compensation for the injury to their lands as abutting lands. The compensation was paid, not because any land was taken, but because the right of the owner as abutter was affected; the damages were given because of the effect of the work on the adjacent land. The new use, Mr. Randolph says, is a taking not because it is inconsistent with the easement of passage for which the land is taken, but because it affects the adjacent property. "In the thoroughfare as such, the adja-

The telegraph and telephone are con- ¹See also Randolph on Eminent Domain, ch. XIII
sidered on pages 531 and 532, and
some cases are referred to.

cent owner has no more interest than any other individual. That use is common, not particular, property; the only limitation upon it is that it may not be so dealt with as to trench upon a private right, such as the right of access to the adjoining property."

§ 82. **Same subject — Other cases.**— The same idea is expressed by Chief Justice Arnold of the supreme court of Mississippi.¹ He says: "A distinction is made by some of the authorities in cases where the fee in the soil of the street is in the public — the state, county, or city — and where it remains in the abutting owner; and in the first case the right of the abutting owner to compensation is denied, and in the latter it is recognized and allowed. We perceive no well-founded difference in principle in such distinction. If the fee is in the public, it is held in trust, expressly or impliedly, that the land shall be used as a street, and it cannot be applied to any other purpose without a breach of trust. It is only where the fee is in the public, free from any trust or duty, that it may be disposed of for any purpose that the public may deem proper. Whether the abutting owner has simply an easement in the street, while the fee is in the public or in some other owner, or whether he has both the fee and an easement, he is equally entitled to require that nothing shall be done in derogation of his rights."²

There is a thoughtful discussion of the subject in a case in Oregon,³ where the court said the question who owns the fee is of very little consequence. The fee cannot be in any real sense in the public, no matter how a street is laid out (whether by deed or statute or dedication); the public have the right of passage for all public purposes and nothing more, and the abutter has rights of light and air and access. So, again, Mr. Justice Depue, in the court of errors of New Jersey, said: "With respect to lands over which streets have been laid, the

¹ *Theobald v. Louisville, etc. R. R. Co.*, 66 Miss. 379, 14 Am. St. Rep. 564 (1889).

² He cites 1 Hare on Constitutional Law, 370, 375; Lewis on Eminent Domain, §§ 114, 115; *Barney v. Keokuk*, 94 U. S. 324; *St. Paul, etc. R. R. Co. v. Schurmeir*, 7 Wall. 272; *Story*

v. New York Elev. R. R. Co., 90 N. Y. 123, 43 Am. Rep. 146; 1 Rorer on Railroads, 524; *Haynes v. Thomas*, 7 Ind. 23; *Anderson v. Turbeville*, 6 Cold. 150; *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546; *Crawford v. Delaware (Village of)*, 7 Ohio St. 460.

³ *McQuaid v. Portland & Vancou-*

ownership, for all substantial purposes, is in the public; nothing remains in the original proprietor but the naked fee, which, on the assertion of the public right, is divested of all beneficial interest,"¹ and this was quoted and applied by Vice-Chancellor Van Fleet of New Jersey, in the case above referred to, in which he held that the posts and wires for supplying electricity for the propulsion of street cars did not affect any substantial right of property of the abutting owner.²

§ 83. **Same subject**—The rights really affected are the rights of adjacency, without respect to ownership of the land in the street.—The question rests not upon what this or that judge thinks of the telegraph or electric light or electric railway with reference to the uses of the street, but rather upon a clear comprehension of what the uses of a street really are, and upon the establishment of a principle underlying the relations of the land-owner and the public, which will apply to all the varying uses to which, with the progress of invention and the necessities of modern society, the streets are commonly put, and which will on the one side protect the individual in the enjoyment of all his rights, and on the other give the public such uses of the streets as public convenience requires. It is only recently that the courts and the writers on this subject have begun to apply to this question the principle that the land-owner has a right in the use of the street in connection with his land which is injured by a perversion of the uses of the street, and which may be affected by a new use, even though such use is authorized by law, and is a proper use of the street for the purposes for which it was laid out. The right of adjacency—the advantage of having your land upon the highway with right of access and light and air,—this is what the people understand and value. Who owns the fee they do not know nor care. The courts have been puzzling themselves over the question whether there has been any legal injury to this intangible fee. The real question of any practical concern to the land-owner or the public is whether the owner is deprived of anything or any advantage which he enjoyed in connection with his land.

ver R. R. Co., 18 Oreg. 237, 22 Pac. Rep. 899, 1 Am. R. R. & Corp. Rep. 34.
¹Hoboken Land & Improvement Co. v. Hoboken, 36 N. J. L. 540, 551.

²Halsey v. Rapid Transit St. R. R. Co., 47 N. J. Eq. 380, 20 Atl. Rep. 859, 3 Am. El. Cas. 283; ch. II, § 21, *supra*.

The decision of the elevated railroad cases in New York has emphasized the importance of these rights of adjacency, and shown that the land-owner can be protected in his enjoyment of the highway, whether his land is taken or not, and that he has rights in the street, which, if they are taken, must be paid for, whether the fee of the street is in him or in the public. This principle was clearly expressed many years ago in New Jersey, where the court of errors maintained the right of the owner of land adjoining a canal to the enjoyment of light and air from over the canal, enjoining the canal company from putting up a building over the canal alongside of the plaintiff's windows.¹ The right of light and air from a public highway, the court said, was established by universal and most ancient custom. "Men do not first build cities and then lay out roads through them, but they first lay out roads and then cities spring up along their lines. . . . When people build upon the public highway, do they inquire or care who owns the fee of the road-bed? Do they act or rely upon any other consideration except that it is a public highway, and that they are adjacent owners?"

If this right of adjacency is fully protected — if a land-owner cannot be deprived without compensation of any privilege he enjoys as land-owner in connection with the street, it will not matter much whether or not he has a right of action for a trespass upon land which he has dedicated to public use and which the public has the right to use for an indefinite time.

I think a definite answer to the question with respect to all the various electric wires will only be obtained when this principle has been fully recognized, and has been applied by the courts not only to the elevated railroad, but also to the street railroad, the telegraph and the telephone.

§ 84. This principle, if recognized, will simplify the discussion, but the distinction must be considered in reading the cases.—If this be the true theory of the relation of the land-owner to new uses of the street, it will greatly simplify the discussion and will do away with distinctions which have not been easy to justify between different modes of use. Take out of the discussion the trespass to the technical fee in the

¹Barnett v. Johnson, 15 N. J. Eq. 481, 488 (1856).

land, and let the question be whether the land-owner has suffered any injury with respect to the pleasant and convenient use of his land in connection with a street, and then the question will be the same whether the new use be a steam railroad or a horse railroad, a telegraph or an electric lighting system. The fact is, however, that the subject has been generally discussed with reference to the ownership of the fee, and the question whether the new use is consistent with the old uses, or is such as should have been anticipated when the street was laid out. A distinction has been taken between cases in which the fee was in the owner of the abutting land and those in which it was in the public, and owners have been held to be entitled to compensation for one use and not for another, on the ground that one was a use not anticipated, and the other was a use that might have been expected to be made of a street, although the real damage may have been the same in both cases. The decision has depended sometimes on the breadth of view taken by the judges as to what are the proper uses of a street, and some uses have been excluded and some admitted when the difference may well be thought to be one of degree rather than of kind. I need not, however, attempt to discuss the general principles of a question which belongs to the broader subject of eminent domain. It has been discussed by Mr. Lewis, Mr. Mills, Judge Dillon and Mr. Randolph with reference to all the various uses of the streets. I will only examine the cases relating to the use of the streets for poles and wires intended for the various applications of electricity.

CHAPTER VIII.

RIGHTS OF ABUTTING OWNERS—TELEGRAPH AND TELEPHONE.

§ 85. **Telegraph and telephone wires have become obnoxious to adjoining land-owners.**—With the increase in the number of the poles and wires required for the purposes of the telegraph and telephone, they have become a serious annoyance to owners of lands along the streets and highways. In cities the many lines of wire darken the windows, and are always a dangerous obstruction in case of fire, and the numerous poles obstruct the view and affect the appearance of the streets of the town. In the country the inconveniences are not so great, but now that the lines have multiplied, and country roads are lined with villas and green lawns, a line of posts and wires often spoils the appearance of a pretty place, and causes serious annoyance, even though it may be hard to prove any pecuniary damage. For these reasons, it is important for land-owners to know whether they have a right to forbid the planting of the poles in front of their lands until legal proceedings have been taken and compensation has been made.

It has become, therefore, a practical question of some importance whether telegraph and telephone lines may be set up along country roads or city streets without the consent of the owners of the lands; and, if not, whether the compensation must be made for the mere occupation of the land in the street, or only for damage to the right of access and other rights included in the privilege of adjacency to the highway.

§ 86. **Question of rights of land-owners suggested but not answered by Scott & Jarnagin in 1868.**—When Scott & Jarnagin wrote their treatise on telegraphs in 1868, they said: "Most of the telegraph lines of the United States, Canada and Great Britain, and probably also in other countries, are along the lines of public highways, either under or upon them, or along the line of railroads, and but few cases are likely to come before the courts between private persons and telegraph companies in relation to the appropriation of lands, either by pur-

chase or condemnation, for the purpose of constructing telegraph lines.”¹ They suggest the question we are now considering, whether the street may be used without additional compensation to the owner of the fee, and express their opinion upon it, but find no judicial decision on either side with respect to lines of telegraph wire. They refer to the conflicting decisions with regard to railroads, and although they thought the more generally received opinion in the American states was that the railroad was only an improved highway and that the owner of the fee had no claim to additional compensation, they go on to say: “How this may be upon principle, and whether or not the railway track should be considered an additional servitude upon the land, there can be little doubt that in the case of telegraph companies, the erection of posts upon the highway or locating pipes under the highway for wires, under legislative authority, without provision for compensation to the owner, would give such owner the technical right to damages, although such damages would be only nominal.” And while they thought he would have his action at law, they said there was little doubt that a court of equity would refuse to entertain a bill for injunction, and that the matter might be considered a question of little or no importance.

§ 87. **The question has now become important.**— Since this was written, the use of electric wires in the streets has greatly increased, and the question has become one of practical importance, not only with respect to the telegraph and telephone, but also because of the effect of the answer upon the other uses of the electric wires in the streets. It is important, therefore, to refer to the cases in which the question has been decided by the courts since Scott and Jarnagin proposed it as a mere matter of speculative interest.

They assumed that it had been determined that railroads were not an additional burden upon the highway, and yet concluded that telegraphs did impose a new servitude. It has since been decided by the weight of authority that steam railroads, as ordinarily operated with locomotives and trains of cars, are not merely an improved highway, but are inconsistent with the ordinary use of the street, and impose an additional bur-

¹Scott & Jarnagin on Telegraphs, § 23 (1863).

den upon the soil;¹ and yet the courts which agree in this are divided on the question whether the telegraph and the telephone may be placed in the streets and highways without compensation.

§ 88. **Question stated.**—It is admitted that the legislature has power to subject the highway to this use. The question is whether it can be done without compensation to the owner of the abutting land. In many of the states the statutes authorizing the construction of the lines expressly require the consent of a land-owner to be obtained before telegraph or telephone poles are planted in front of his land on his side of the street, and in these cases there is, of course, no doubt that compensation must be paid unless the consent be obtained; and, indeed, if no provision is made for condemnation, the consent is necessary to the right to plant the poles. But, supposing no condition to be imposed by the legislature, and no provision to be made for condemnation, the question now is whether the use of the street or highway for the telegraph or telephone lines imposes a new burden upon the land or affects in any way the rights of the owners of the land upon or in front of which the street is laid.

§ 89. **Argument on one side.**—On the one side it is argued that the easement of highway is, in the last analysis, intercommunication or the right to the use of the highway by the public generally for the purpose of intercommunication. Its purpose has always been not merely travel and transportation, but also the transmission of intelligence. It has been used by the post-horse and the mail-wagon, as well as the coach and the cart. When new kinds of roads and new modes of travel and transportation become necessary, the public have a right to use them, and they impose no new burden on the soil unless they are inconsistent with the old use; and so, when new means of communication are found, the public may use the highway for these, and if the old use remains unimpaired the owner of the

¹ See *Morris & Essex R. R. Co. v. St. Ry. Co.*, 47 N. J. Eq. 380, 21 Atl. Newark, 2 Stockt. (10 N. J. Eq.) 352; Rep. 859; *Van Horne v. Newark Pass. Starr v. Camden & Atlantic R. R. Co.*, R. R. Co., 21 Atl. Rep. 1034, 48 N. J. Eq. 332; *Hinchman v. Paterson H. R. R. Co.*, 17 N. J. Eq. 75; *Citizens' Coach Co. v. Camden*, 33 N. J. Eq. 267; *Halsey v. Rapid Transit* and notes.

soil has no cause to complain. He has given his land for a public highway. It is used for a public purpose for which a highway was designed, and he has still the old use unimpaired.¹ The telegraph, therefore, being a legitimate use of the highway for the purposes for which it was dedicated, it is only a new method of using an old easement and imposes no new burden on the soil.

§ 90. **Argument on the other side.**—On the other hand, it is contended that the streets and highways were intended primarily for travel and transportation, and that, although they were intended also for the transmission of intelligence, and the telegraph is used for that purpose, yet the mode of use is so wholly different from the old one, and requires such permanent occupation of the soil, that it cannot be supposed that the land-owner, in dedicating his land for purposes of a highway, or the public in condemning it, contemplated that it should be used by a telegraph company for the erection of posts and the stringing of wires. The land-owner has given only the right of user for a public highway, and retains the fee in the soil; or if the public have the fee, they hold it in trust for the highway use; the land-owner, therefore, has a right to complain of the permanent occupation of the soil and the setting up of obstructions in the street, and if he has not, there is nothing to prevent the posts being put up so as to form a barrier between his land and the street, and the wires from being so numerous as to be annoying and dangerous.

¹ The argument on this side of the question is very well presented in the brief of Robert Stiles of the Virginia bar, in *Western Union Tele. Co. v. Williams*, Sup. Ct. of Appeals of Virginia, decision reported in 86 Va. 806, 11 S. E. Rep. 106 (1890). He suggests as true tests of a legitimate use of a highway the following: Is the alleged new use, so far as its purpose, object and effect are concerned, within the scope of the easement of a highway? and, second, Would the new use be inconsistent with the further exercise of this easement in the manner in which it was originally, or is

at the time, enjoyed? Applying these tests to the new uses as they come up, the turnpike, the plank road, the street railway and the steam railway, he finds they all pass it except the last, and then applying it to the telegraph, he insists that it passes them both, answering one of the most important purposes for which the highway was intended, taking the place of the messenger and the mail wagon, and not interfering with the free use of the highway for travel or transportation or access to the adjoining land.

§ 91. **Distinction in the cases with respect to the title to the land in the street.**—It is to be noticed in reading the decisions that some of them make a distinction between cases in which the fee is in the land-owner and those in which the fee is in the public, and allow compensation for the use of the soil in the one case and not in the other. This is not a distinction that works practical justice, because it will be found that when land is taken or condemned for a street it is not regarded as of any practical importance whether the public take the fee in trust for the uses of the street and subject to the special easements of the adjacent owner, or whether the possession and beneficial use are given to the public, while the owner keeps such property in the land as remains for him.¹ The distinction was disregarded in the elevated railroad cases, and a just decision was reached by recognizing the special interest of the adjacent owner in the street, and giving him damages for being deprived of the advantages his land was entitled to, as adjacent land, whether he or the public owned what is called the fee. However this may be, it is well, in reading the cases, to observe whether the fee is in the individual or in the public, and whether or not this fact is made the basis of the decision.

§ 92. **Cases in Missouri in 1882 in favor of the electric wires.**—It is only recently, as I have said, that any cases have been reported on the question whether the owner of abutting land is entitled to damages for the construction of a telegraph line in the street in front of his premises. There were two cases in 1882 decided by the St. Louis court of appeals. In the first,² it was held that, in the absence of special injury, the land-owner is not entitled to an injunction against planting a telegraph pole in front of his premises. The mere presence of the pole, the court said, would not be a sufficient ground of complaint. There must be such inconvenience that the pole would be a nuisance if it were not authorized for a public use. In the second case,³ an injunction was granted against the erection of

¹ Mr. Randolph's article on Eminent Domain Over Streets, 12 N. J. Law Journal, 133; Randolph on Eminent Domain, §§ 415, 416; McQuaid v. Portland & Vancouver R. R. Co., 18 Oreg. 237, 22 Pac. Rep. 899, 1 Am.

R. R. Corp. Rep. 34. See ch. VII, §§ 78-84, *supra*.

² Gay v. Mutual Union Teleg. Co., 12 Mo. App. 485, 1 Am. El. Cas. 427.

³ Forsythe v. B. & O. Teleg. Co., 12 Mo. App. 494.

a broken and unsightly pole which might be dangerous, but was refused as to a proper pole, although it was to be erected within four feet and three inches of the plaintiff's dwelling-house, and the plaintiff was the owner of the fee in the land to the middle of the street. The court said there was no evidence of any injury to the fee, but that the only claim was an injury to the easement in the street by the obstruction of travel, and that there was in fact no real obstruction of travel or access.

The meaning of these decisions is, that the land-owner is not entitled to protection against a trespass upon the technical fee, the beneficial use of which is in the public, but only against an injury to his easement of access and travel, or when his enjoyment of the privileges of an adjacent owner are in some way affected. It must be observed, however, in comparing decisions in Missouri with those in many other states, that the courts of Missouri had already decided that even a steam railroad, duly authorized, is not a perversion of the purpose of a street, nor a new burden upon the fee, but that the land-owner is only entitled to compensation for the damage done to the adjacent land by reason of the construction and operation of the railroad.¹ How this principle is applied to the telegraph will appear in the later cases in Missouri, to be quoted presently.²

§ 93. Decision in Massachusetts on the same side in 1883.

The next reported decision on this side of the question was rendered a year later by the supreme judicial court of Massachusetts. The case was *Pierce v. Drew*;³ the whole subject was thoroughly discussed, and the judges were divided in opinion. The majority maintained that an additional servitude was not imposed by the appropriation of part of a public highway under the statute (Pub. Stat., ch. 109) for the use of a line of electric telegraph. The whole beneficial use of the highway, they said, had been given to the public, and the use by a telegraph line is analogous to that by gas and water pipes. A change of public use requires no new compensation. When the land was taken, it was taken not merely for the privilege of traveling

¹ *Porter v. Railroad Co.*, 33 Mo. 128; *Co.*, 88 Mo. 258 (1885); *St. Louis v. Lackland v. Railroad Co.*, 34 Mo. 259, *Bell Teleph. Co.*, 96 Mo. 623, 1 Am. El. Cas. 801 (1885).
§ 118, note.

³ 136 Mass. 75 (1883).

² *Julia Building Ass'n v. Bell Teleph.*

over it by the then known vehicles, or of using it by the then known methods of either conveying goods or transmitting intelligence. The telegraph is a new method of transmitting intelligence—a new method of using an old easement. It is recognized as such by the act of congress which declares that all post-roads may be used for telegraph lines.¹ No compensation, therefore, need be made to the land-owner for the mere erection of a line of telegraph along the road. C. Allen and Wm. Allen, JJ., dissented, insisting that the multiplication of telegraph wires might be a serious damage to the land-owner, and that, as it could not be anticipated and paid for by the city or county, on laying out a road, it ought to be paid for by the telegraph company when the line was actually to be constructed.

§ 94. **Later case in Missouri.**—This decision was followed in 1885 by the case of *Julia Building Association v. Bell Telephone Co.*, decided by the supreme court of Missouri.²

The question came up on an application by the owner of a store in St. Louis for an injunction restraining a telephone company from cutting a hole in the pavement in front of his building and setting up a pole there. It was alleged that the company was about to cut a hole in the stone wall supporting a vault under the pavement. The plaintiff owned the fee to the middle of the street. The telephone company had authority from the legislature and the city council to construct the line. The court held that the street might be applied to all purposes consistent with the proper uses of a street, and that it is only when it is subjected to a new use, subversive of the old one, that the abutting land-owner has cause to complain, and they decided that the telephone was a proper use for a city street, even if, as had been held in Indiana, it were not so for a country highway.³ Henry, C. J., and Sherwood, J., dissented, on the ground that it was not a use contemplated in the laying out of the street, and had nothing to do with the ordinary uses of a street. "The telephone does not need the street for its construction, and there is no connection between public travel and talking through a telephone." The chief justice suggested that if planting telephone poles is a legitimate use of the street,

¹ Act of July 24, 1886, U. S. Rev. Stat., § 5263.

² 88 Mo. 258, 1 Am. El. Cas. 801.

³ Board of Trade Teleg. Co. v. Barnett, 107 Ill. 507, 27 Am. Rep. 453, 1 Am. El. Cas. 565.

the telephone company had no occasion to get permission from the city to set them, because every individual, including corporations, may make any legitimate use of the street without permission of the city, which can only regulate such use, but does not confer the right which it derived from dedication.¹ This argument is a strong one, but it applies with equal force to street railways and other special or privileged modes of exercising the public use, and the answer to it is, no doubt, that the power really comes from the legislature, which, having supreme power over the highways, has the power to authorize special uses for certain parts of the road within the scope of this general purpose of the highway.

§ 95. **Other decisions on the same side.**—These decisions were followed by the supreme court of Louisiana in *Irwin v. Great Southern Teleph. Co.*,² Manning, J., dissenting. In this case the fee was in the public, and the court said that the legislature, having authorized the use of the street by the telephone, the land-owner had no cause to complain unless his right of ingress and egress was affected.

In two cases arising in the city of Washington the question related solely to the rights of the plaintiff as adjacent owner, the title to the streets being in the national government. The situation, of course, was the same as if the title were in the city or the public generally under a state government. A perversion of the streets from their proper use would affect the plaintiff's rights whether he owned the fee or not. These cases were *Hewett v. Western Union Teleg. Co.*³ and *McCormick v. District of Columbia*.⁴ Bills were filed for an injunction against putting up a telegraph line along a street in Washington in front of the plaintiff's place of business. The company had acquired a right, under the act of congress of July 24, 1866, to use the streets, and the commissioners of the District of Columbia had given their consent, so that the only question was whether private rights were affected. It was insisted that the poles would seriously obstruct the ordinary use of the premises and of the street as a highway contiguous thereto, and that the wires were a source

¹ See Lewis' Em. Dom., §§ 111, 124; ch. II, § 35, *supra*.

² 37 La. Ann. 63 (1885).

³ 4 Mackey (D. C.), 424, 2 Cent. Rep. 694 (1886).

⁴ 4 Mackey (D. C.), 396, 54 Am. Rep. 284 (1886).

of danger, and that the noise of the wind whistling through them would be a nuisance. The poles were one hundred and fifty feet apart, and were not near the plaintiff's doorways. The court said that an injunction would only be granted in case of serious and irreparable injury, and that no such injury was threatened in this case. It could not be seriously contended that the access or light and air were interfered with, and the danger and nuisance arising from the wires were very slight. The bills for injunction were dismissed.

§ 96. **The same — Later cases on the same side.**— These decisions were quoted and followed in Montana in 1892,¹ and it was held that the purposes of the telephone were within the proper use of the streets of a city, and that an abutting owner who had not the title to the fee, and who was threatened with no peculiar or unnecessary inconvenience, was not entitled to an injunction against the erection of poles and stringing of wires in front of his land.

There was a decision in Michigan to the same effect in 1894,² and the court said: "When these lands were taken or granted for highways, they were not taken or granted for such uses only as might then be expected to be made of them by the common methods of travel then known, or by the transmission of intelligence by the only methods then in use, but for such methods as the improvements of the country or the discoveries of future times might demand." So, also, in Minnesota in 1895,³ the supreme court said: "It seems to us that a limitation of the public easement in highways to travel, and the transportation of persons and property in movable vehicles, is too narrow. In our judgment public highways, whether urban or rural, are designated as avenues of communication;" and they held that the new method of transmission of intelligence came within the general purpose for which roads were opened, and was within the "highway easement." To the objection that the telephone poles were immovable, they said that it was intended to subserve a proper use of the street, and that if so they were

¹ *Hershfeld v. Rocky Mountain Bell Teleph. Co.*, 12 Mont. 102, 4 Am. El. Cas. 72.

Am. El. Cas. 87, 24 L. R. A. 721, with note (1894).

² *People v. Eaton*, 100 Mich. 208, 5

³ *Cater v. Northwestern Exch. Teleph. Co.*, 60 Minn. 539, 63 N. W. Rep. 111, 5 Am. El. Cas. 111.

not an additional burden unless they unreasonably impaired the easements of the abutting owners.

A local court in Pennsylvania,¹ after referring to the conflicting cases in other states, said the question seemed to be governed in that state by the decision in the Lockhart case, that an electric railway did not constitute a new burden upon the highway, and that there appeared to be no distinction between the telephone poles and wires and those of the trolley railway that is not in favor of the former. And in a recent case in Indiana it was held that the erection of poles and wires for the telephone upon city streets is not an additional servitude for which owners of the adjacent lands are entitled to compensation.²

§ 97. Wires without poles not a burden on the land.—In a case in New Jersey³ in which no pole was set up in front of the complainant's land (for which the statute requires his consent), and the complaint was that the wires were about to be stretched along the street on his side of the way, the court of chancery refused to grant a preliminary injunction, saying that it was doubtful whether the complainant had a right to complain of the use of a street for stretching telegraph or telephone wires, and that there was no such urgent necessity as to call for a preliminary injunction. The chancellor (Runyon) referred to the decision in *Pierce v. Drew*, that the telegraph did not impose a new burden on the highway, and, alluding to the statute requiring the consent of the land-owner to the planting of poles in the street in front of his land, he said: "The legislature of this state appears to have considered that the use of the street, so far as the wires are concerned, was not a violation of the rights of the owner of the soil in the street; for, while it recognizes such rights as to the erection of

¹ York Teleph. Co. v. Keesey, 5 Pa. Dist. Co. Rep. 366, 6 Am. El. Cas. 107 (1893).

² Magee v. Overshiner, 150 Ind. 127, 49 N. E. Rep. 951 (1898).

In Worth v. Postal Tel. Cable Co., 7 Ohio Cir. Ct. Rep. 290, 5 Am. El. Cas. 184, note, an abutting owner who had allowed a telegraph line to remain in front of her land for nine

years without objection was not allowed an injunction against replacing old poles with new ones, and increasing the number of wires from eight to thirteen.

With respect to cutting trees along the roadside, see *infra*, §§ 105, 106.

³ Roake v. Am. Teleph. & Teleg. Co., 41 N. J. Eq. 33, 2 Am. El. Cas. 218 (1886).

poles, it does not do so as to the wires." It is obvious that the stretching of wires over the plaintiff's land in the street is no less a violation of his right of property in the land than the planting of poles; for if he owns the land he owns *usque ad cælum*.¹ If, therefore, the use of the street for the telegraph is a perversion of its proper use and imposes a new servitude, the land-owner has as much right to complain of the wires as of the poles. The distinction made, therefore, by the chancellor between the wires and the poles is significant, because the cases in New Jersey with reference to poles, which are governed by a statute, are frequently cited as authority for the general proposition that the telegraph imposes a new burden on the highway.²

§ 98. Cases on the other side—Decisions in New York and New Jersey.—On the other side of the question we find a longer list of cases, although in some of these, as in some of the others, there is disagreement among judges, and in some the decisions rest upon the fact that the statute authorizing the use of the streets has made express provision for obtaining the consent of the land-owner or making compensation.

¹Electric Tel. Co. v. Overseers of the Poor of Salford, 24 L. J. (N. S.), Magistrates' Cases, 146. *Per* Pollock, C. B.: "Whether the line goes underground or in the air, the proprietors of it exclusively occupy a certain portion of space, of which they have complete control."

The title of the local authorities to the land in the streets does not necessarily extend upwards indefinitely, but a title given by statute has been held to include only the surface, and so much above and below it as may be required for the uses of a street. Wandsworth District Board of Works v. United Telephone Co., 13 Q. B. D. 904 (1884).

²See Lewis' Em. Dom., § 131 and note. Chancellor Runyon, however, in a later case, referring to poles put up without the consent required by statute, said the company, without pretense of legislative authority and

without the consent of the plaintiff, had put up poles upon his land (in the street) and had thus subjected the land "*to an additional servitude besides that for which it was condemned.*" *Broome v. N. Y. & N. J. Telephone Co.*, 42 N. J. Eq. 141 (1886), 2 Am. El. Cas. 259. The difference, no doubt, is that in this case the use was not authorized, but in violation of the legislative condition; whereas in the former case there was no condition violated, and the company was authorized to use the public streets. *Vice-Chancellor Van Fleet*, however, in *Halsey v. Rapid Transit Ry. Co.*, 47 N. J. Eq. 380, 20 Atl. Rep. 859, 3 Am. El. Cas. 283 (1890), in distinguishing between the telegraph and the electric railway, assumes it to have been decided by the general current of judicial authority that the telegraph is not within the public easement of a street or highway.

In *Dusenbury v. Mutual Telegraph Co.*, in the New York superior court,¹ the plaintiff owned land on a village street, and his title extended to the middle of the street. The telegraph act² gave a right of entry to telegraph companies, subject to the right of the owner or owners to full compensation. The court construed this as a condition precedent, applicable to streets and highways as well as to other lands, and held that ejectment would lie against a company which had set up poles in the street on the plaintiff's land. The court said: "It is undisputed that the plaintiff owns the land thus occupied, subject only to the highway easement, which, as between him and the defendant, leaves his ownership complete and exclusive."

In *Metropolitan Telephone and Telegraph Co. v. The Colwell Lead Co.*,³ it was held by Judge Ingraham at a special term that the legislature has no power, so far as abutting owners are concerned, to authorize the use of the streets of New York for the erection of telegraph and telephone poles and wires. The fee of the street in that case was vested in the city, but the judge said that the city held it in trust for use as a public street, and that the use of a street for a telephone line did not come within the purpose of the trust, and that the power of the legislature to regulate streets did not extend to permitting such a use without the consent of property owners.

The same conclusion was reached by the supreme court in two cases in 1893,⁴ and one of these was affirmed in the court of appeals in 1894.⁵ This was a case in which a telegraph line had been set up along a rural highway, the fee of which was in the adjoining owner. The court held that the use of the land for the poles and wires of a telegraph line was not within the public uses to which land taken for a rural highway was dedicated; that the primary use of the highway was passage, and the primary law of it was motion; and that the permanent exclusive possession, even of a small portion of it, cannot properly be

¹ 11 Abbott New Cases, 440 (1882).

² Laws of New York, 1853, ch. 471, amending act of 1848, ch. 265.

³ 67 How. Pr. 365, 50 N. Y. Super. Ct. 488 (1884), 1 Am. El. Cas. 662.

⁴ *Blashfield v. Empire State Teleph.*

& Teleg. Co., 71 Hun, 532, 24 N. Y. Supp. 1006, 4 Am. El. Cas. 146; *Eels v. Am. Teleph. & Teleg. Co.*, 72 Hun, 516, 20 N. Y. Supp. 600.

⁵ *Eels v. Am. Teleph. & Teleg. Co.*, 143 N. Y. 133, 5 Am. El. Cas. 92.

regarded as a new method of using the old public easement; and whatever might be the rule in densely populated cities, the easement to which a rural highway is subject does not include the erection of telegraph poles without compensation. And the court said it made no difference, with respect to the nature of the easement, whether the fee were in the adjoining owner or not, and that the rights of the land-owner were not affected by legislation of many years' standing which seemed to ignore his rights. These cases were followed by the commissioners of appraisal in *Postal Telegraph Cable Co. v. Bruen*,¹ but it was found that the damages were merely nominal.

Under a statute in New Jersey authorizing the erection of poles subject to making compensation, it was held² that a mandatory injunction should issue to compel a company to take down poles put up without the consent of the land-owner, and without having taken proceedings to condemn. The chancellor spoke of the setting up of poles on the land in the highway as subjecting the land to an additional servitude, and an invasion of the plaintiff's proprietary rights, for which the defendants had obtained no authority under the terms of the statute. The chancellor was speaking, however, of the planting of poles without the consent required by statute, and does not modify the opinion he had recently expressed in regard to wires.³ In a later case in New Jersey,⁴ Vice-Chancellor Van Fleet, deciding that an electric street railway was not a new use of the street, distinguished between this and the telegraph, saying that the use the new method makes of the street is the real test, and that this principle exhibits in a clear light the reason why it has been held that placing telegraph and telephone poles in the street imposes an additional servitude on

¹ 39 N. Y. Supp. 220 (1896), 6 Am. El. Cas. 120.

² *Broome v. N. Y. & N. J. Teleph. Co.*, 42 N. J. Eq. 141 (1886), 2 Am. El. Cas. 259.

³ *Roake v. Am. Teleg. & Teleph. Co.*, 41 N. J. Eq. 35, referred to in § 97, *supra*. See also *Broome v. Telephone Co.*, 49 N. J. L. 624, 50 N. J. L. 432, 2 Am. El. Cas. 269; *Winter v. Telephone Co.*, 51 N. J. L. 83, 2 Am. El. Cas. 272, as to the necessity

for stating the size and location of the poles in a petition to condemn and assess damages so as to show the extent of the burden to be imposed.

⁴ *Halsey v. Rapid Transit St. Ry. Co.*, 47 N. J. Eq. 380, 20 Atl. Rep. 859-864, 3 Am. El. Cas. 283. See also *Taggart v. Newport St. Ry. Co.*, 16 R. I. 668, 19 Atl. Rep. 326, 2 Am. Corp. & R. R. Rep. 44, with note, 7 L. R. A. 205, 3 Am. El. Cas. 306.

the land. He said: "They are not placed in the street to aid the public in exercising their right of free passage, nor to facilitate the use of the street as a public way, but to aid in the transmission of intelligence. Although our public highways have always been used for carrying the mails, and for the promotion of other like means of communication, yet the use of them for a like purpose, by means of the telegraph and telephone, differs so essentially in every material respect from their general and ordinary uses, that the general current of judicial authority has declared that it was not within the public easement. Massachusetts has, however, by a divided court, held otherwise. *Pierce v. Drew*, 136 Mass. 75."

With regard to the telegraph and telephone, however, it has since been decided by the court of errors of New Jersey that their purposes are not within the easement of a public highway, and that the right to place poles in the street, without the consent of the abutting owner, can only be acquired through the power of eminent domain.¹

§ 99. Cases in some western courts.—In *Willis v. Erie Telegraph and Telephone Co.*,² the judgment of the court below was that the placing of telegraph and telephone poles in a city street, under license of the city authorities, was an infringement of the rights of the owner of the fee.

On appeal the question was thus stated by the court: "Is such a case within the purposes for which a city street must be deemed to have been established, so that the individual proprietor is not entitled to further compensation, or is there a new appropriation of the land not embraced in the original dedication or condemnation of the street for public purposes?" On this question the court was equally divided, and no opinion was written on either side, but the judgment below was affirmed.

*Board of Trade Teleg. Co. v. Barnett*³ was an action of trespass by the owner of land abutting upon a highway (not a city street) against a telegraph company for putting up poles just outside of the hedge, and cutting some of the trees of the hedge. By way of justification the defendant pleaded that

¹ *Nicoll v. N. Y. & N. J. Tel. Co.*,

² 37 Minn. 347 (1887).

42 Atl. Rep. 583 (1899), affirming S. C.,

³ 107 Ill. 507, 27 Am. Rep. 453 (1883).

40 Atl. Rep. 627 (1898).

the acts complained of were necessarily done in building a telegraph line authorized by law, and having the consent of the county board. It was held that the action would lie, and that the statutory permission was subject to the constitutional inhibition that private property shall not be taken nor damaged for public use without just compensation. The court said that a telegraph line was not a part of the public easement in the highway, but a new and additional burden thereon, a use to which it was not contemplated that the highway should be subjected, and for which the owner is entitled to additional compensation. The case was likened to that of a railway which had been held in Illinois to be an additional burden and a new kind of use of the highway.¹ This case was distinguished in *Julia Building Association v. Bell Telephone Co.*,² on the ground that it related to a country road and not a city street.

In *Smith v. Central District Printing and Telegraph Co.*,³ the circuit court of Trumbull county, Ohio, followed *Board of Trade v. Barnett*, and held that a telephone or telegraph line upon a highway (it was a country road, and not a city street) was a new burden upon the land not contemplated when the road was laid out, and that the owner was entitled to compensation. Poles put up pending the litigation and after objection were ordered to be removed.

In a later case, in the supreme court of Illinois, it was held that a county board has no power to permit a telegraph company to erect poles for a telegraph in a highway without compensation to the owner of the land, in view of the declaration in the constitution that private property shall not be taken or damaged without just compensation;⁴ and there is a decision to the same effect in the Illinois appeals,⁵ where it was held that the use of the land within a highway for the poles and wires of telegraph companies imposes a burden not contemplated in the original taking.

¹ *B. & W. R. R. Co. v. Hartley*, 67 Ill. 439.

² 88 Mo. 258, quoted in § 10, *supra*.

³ 2 Ohio Circuit Ct. 259 (1886).

⁴ *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513, 49 N. E. Rep. 365 (1898).

⁵ *American Teleph. & Teleg. Co. v. Jones*, 78 Ill. App. 372 (1898). See, however, *Jaynes v. Omaha St. Ry. Co.*, 53 Neb. 631, 74 N. W. Rep. 67 (1898), referred to in ch. X, § 105.

In *Daily v. State of Ohio*,¹ where the question arose in an action of trespass for cutting the limbs of shade trees growing on the side of a road, the supreme court of Ohio declared that the land and the trees belonged to the plaintiff, subject only to the conveniences of public travel, and that the telegraph line was a new use and imposed an additional burden, and that the telegraph company, even though it was using a post-road, was not authorized to take the plaintiff's property in the trees without compensation; and if there were any distinction between rural and urban highways, it would be in the latter rather than the former that the telegraph and telephone lines really affected the easement of the land-owners.²

In *Pacific Postal Telegraph Co. v. Irvine*,³ referring to a country road, the court said: "Where the fee of the highway is vested in the public there can be no legal objection to the grant by the public of a right to erect such poles and wires without regard to the adjacent property owners; but where, as here, the fee of the highway remains in the adjacent owner, and only its use for the purposes of public travel has been granted, I think it is clear that every use of the public highway not in the line of such travel is an additional burden for which the proprietor of the fee is entitled to compensation."

§ 100. Cases in Virginia, Maryland and Mississippi.—In the supreme court of appeals of Virginia⁴ a very strong argument was made by counsel⁵ in favor of the proposition that a telegraph as a means of communication is a proper use of a public highway, for which no compensation need be made; but the court decided that, by the condemnation of the land for a road, the public had acquired only a right of way, and that the extent of the condemnation was the right to pass along over the road, and that for all other purposes the title remained in the individual: to dig the soil was to dig his soil, and to put up

¹ 51 Ohio St. 348, 5 Am. El. Cas. 186 (1894). See also *Smith v. Telegraph Co.*, 2 Ohio C. C. 259.

² See *Eels v. American Teleg. Co.*, *Blashfield v. Empire State Teleg. & Teleg. Co.*, *supra*, § 98. In these cases it was held that in rural if not in urban streets the telegraph or telephone line was a new burden.

³ 49 Fed. Rep. 113, 4 Am. El. Cas. 140

(1892). See also *Spokane v. Colby*, 16 Wash. 610, 48 Pac. Rep. 248.

⁴ *Western Union Teleg. Co. v. Williams*, 86 Va. 896, 11 S. E. Rep. 106, 8 L. R. A. 429, 30 Am. & Eng. Corp. Cas. 564, 2 Am. R. R. & Corp. Rep. Ann. 258, 3 Am. El. Cas. 184 (1890).

⁵ Mr. Robert Stiles of the Virginia bar.

a post was to take possession of his land, and the right to do these things must be paid for before it can be acquired. It was held that the court below was right in charging the jury that the owners of the soil had the exclusive right to the land in the road, subject to the right of public passage, and that the fact that the road was a public highway did not authorize the erection of telegraph posts without the owner's consent.

A later decision, made in view of all the previous decisions on both sides, was that of the court of appeals of Maryland on March 24, 1891.¹ In an action of trespass for placing a telephone pole in the street on the plaintiff's land, a plea that the defendants were a telephone company, authorized to construct a line along post-roads, and having the permission of the city government, was held, on demurrer, to be bad, because the statutes could not give the right to use the plaintiff's land without compensation. The subject of the rights of abutting owners was discussed and many cases were cited.

Again, on May 4, 1891, it was held by the supreme court of Mississippi² that a city cannot grant a company the right to erect a telegraph line along a public street without making compensation to the owners of abutting land, because the telegraph is a new use and an additional burden, and it makes no difference whether the fee of the street is in the abutting owner or in the public.³

§ 101. Views of text-book writers.—The large majority of the decisions thus far seem to be in favor of the view that the telegraph is an additional burden on the highway, and this seems to be accepted by the text-writers who refer to the subject as the better opinion.⁴ Mr. Lewis, in his work on Eminent

¹ Chesapeake & Potomac Telephone Co. v. Mackenzie, 21 Atl. Rep. 690, 74 Md. 36, 3 Am. El. Cas. 196.

² Stowers v. Postal Telegraph Cable Co., Sup. Ct. Miss., 44 Alb. L. J. 133, 9 S. Rep. 356, 12 L. R. A. 864.

In Theobald v. Railway Co., 66 Miss. 279, 6 S. Rep. 230, 4 L. R. A. 735 (1889), it was said, in passing (*obiter*), that the telegraph is an additional burden, and that it makes no difference whether the fee is in the land-owner or the public.

³ In American Teleph. & Teleg. Co. v. Pearce, 71 Md. 535, 18 Atl. Rep. 910, 7 L. R. A. 200, a telegraph line was held to be an additional burden on land already condemned for the right of way of a railroad. For other cases on that subject, see ch. XIII, *infra*.

⁴ Lewis, Em. Dom. § 131; Dillon, Mun. Corp. (4th ed.), §§ 698, 698a; Elliott on Roads and Streets, pp. 533-536.

Mr. Angell, in his work on Highways, refers to the cases, and ex-

Domain (§ 131), says: "The lines of a telegraph or telephone company are on the same footing as the steam railroad. They form no part of the equipment of a public highway, and are entirely foreign to its use." He makes a distinction, however, between cases in which the fee is in the public and those in which it is in the abutting owner. He says that in the latter case the owner is entitled to compensation for the additional burden placed upon his land, and in the former case he may recover for interference with his rights; but that if there is no interference with the ingress and egress, or the light and air, there is no taking, because there is no damage. Judge Dillon, on the other hand (§ 698*a*), says he "considers the true doctrine to be that the rights of the abutter, as between him and the public, are substantially the same whether the fee is in him, subject to the public use, or is in the city in trust for street uses proper;" and his conclusion is that, "on the whole, the safer and perhaps sounder view is that such a use of the street or highway, attended as it may be, especially in cities, with serious damage and inconvenience to the abutting owner, is not a street or highway use proper, and hence entitles such owner to compensation for such use, or for any actual injury to his property caused by poles and lines of wires placed in front thereof."

§ 102. Conclusions with respect to the right to use the highways for the telegraph and telephone.—It may be suggested, however, that it is not yet safe to predict which of the two views will finally prevail. It is certain that no distinction can permanently endure which makes a practical difference between two public streets with respect to the technical title to the soil. When men lay out land for streets, they dedicate it for street uses, retaining all the privileges of adjacency; when they convey land to the city for a street, or when the city condemns land for a street, the land is taken for the purposes of a street, and for these only, and the individual retains the same rights of adjacency as before.

presses no definite opinion. 3d ed., § 91*a*.

See also Mr. Lewis' Notes to Western Union Teleg. Co. v. Williams, 2 Am. R. R. Corp. Rep. 253, 263, and Am. Teleg. & Teleph. Co. v. Smith,

1 Ibid. 73-86. Also note to Taggart v. Newport St. R. R. Co., 2 Am. Corp. & R. R. Cas. 56; Randolph on Eminent Domain, 407. See also notes in 23 Am. State Rep., pp. 229-233.

The decision of the question depends not on the nature of the title to the street, but on the question whether the rights and privileges of the abutting owner in the use and maintenance of the street as such are affected, and on the further question what is the scope of the uses and purposes of a public street. It is only recently that the courts have begun to look at the subject from this point of view. The older reports are full of cases which take the distinction with respect to the title of the land, in deciding on the rights of railways in the streets, and in the later cases the distinction has been gradually ignored. At length the question was brought squarely up in the New York elevated railroad cases,¹ and the court of appeals of New York held that it made no difference whether the fee was in the city or the individual; but that in either case the land-owner was entitled to damages for the injury to his rights as adjacent owner, his right of access, and of light and air. These cases illustrate this principle so clearly that they may yet influence judicial opinion in dealing with all the uses of a street, and afford a satisfactory basis upon which the rights of land-owners may be protected, while the streets are thrown open to every improved method of accomplishing their general public purpose, so that they may serve the greatest public good.

There must be an extension of the uses to which streets are put, and so long as they serve the public convenience, and do not affect the use formerly enjoyed by the land-owner, there would seem to be no good reason why the land-owner should have a right to object, since in such a case, if he were entitled to damages, they would amount to nothing.

It could hardly be said, moreover, that the rule was settled if it should be found that, according to the rule, a land-owner could object to the use of poles and wires for the telegraph, but not for the electric light, or to the use of a pole and wire for the ordinary telegraph, but not for the fire-alarm telegraph;

¹Story v. N. Y. Elev. R. R. Co., 90 N. Y. 1. See also Railroad Co. v. N. Y. 132; Lahr v. Met. Elev. R. R. Bingham, 87 Tenn. 522, 11 S. W. Rep. Co., 104 N. Y. 268; Pond v. Met. Elev. 705; Smith v. Railroad Co., 87 Tenn. R. R. Co., 112 N. Y. 186; Porter v. 636, 11 S. W. Rep. 709; McQuaid v. Met. Elev. R. R. Co., 120 N. Y. 234; Portland & Vancouver R. R. Co., 18 Abendroth v. Manh. R. R. Co., 123 Oreg. 237, 22 Pac. Rep. 889.

or that poles with wires overhead trespass upon the fee of the soil, while wires underground do not; and yet, as we shall see presently,¹ it is quite clear that electric wires for lighting a city, and telegraph and telephone lines for the fire and police purposes, are a proper use of the street, and that if gas pipes may be laid underground without compensation, there can be no objection to cables for furnishing electric light to private houses. And if this be so, it would be hard to exclude the telegraph and the telephone from the use of the same subways.

§ 103. Distinction between rural highways and city streets — Urban and suburban easements.— A distinction is made between rural highways and city streets, and it is suggested that the public uses for which the one is dedicated are different from those to which the other must be subject. The question resolves itself after all into the question of public necessity. Before the days of the telegraph the city street was, equally with the rural highway, free from obstruction by telegraph poles, and the dwellers on the one as well as on the other had no actual anticipation of the use of the street for this purpose. As a matter of fact, the telegraph is such that the country road is required for it as well as the city street.

It is the later uses of electricity, the telephone or the electric light, that have filled up the city streets with poles and wires.

Another difficulty is that it is hard to distinguish between a rural and an urban street, and that the nature of a street changes insensibly from the former to the latter, and a rule of property which depends on such a shifting and indefinite distinction is not likely to prove satisfactory.

§ 104. Fire-alarm and police telegraph — Fire-alarm and police telegraph are public uses — No doubt the streets may be used for these without compensation.— It would seem to be beyond question that the streets of a city, or even a village, might be used by the local authorities for sending signals to guard against disorder and conflagration, and that this may be done by means of posts and wires in the streets without the consent of abutting owners. It is not, like electric lighting, a use connected directly with the streets themselves, but it is a municipal use of the greatest importance; and although it is a use which could not have been contemplated when some of the

¹ § 104, *infra*.

streets were dedicated, it is one which by common consent would be regarded as necessary and proper, and one which public opinion would not allow individuals to interfere with.

I am speaking only of the claim of a technical right in the soil, and of additional servitude. Of course, if the right of access were interfered with, or the wires became so numerous as materially to diminish the light, the owner might be entitled to damages. And it has been held that the unnecessary cutting of trees on the sidewalk is actionable, even though the fee is in the public, and the wires are being put up for the city government for the purpose of a fire alarm.¹

§ 105. Rights to compensation for actual damages in obstructing access and light and air, etc.—Whatever conclusion may be reached as to the right to plant poles without the landowner's consent, there is no doubt that the adjacent owner has redress against any substantial obstruction of his right of access or interference with his enjoyment of the use of the street in connection with his land.² This right of adjacency is not the right the owner has in common with others to complain of an obstruction of the street to the inconvenience of general travel. That is a matter over which the legislature has control, and the remedy for an unlawful obstruction is by indictment. The obstruction must be one which interferes with his enjoyment of his land with reference to the street. For this he has a remedy by injunction, whether he owns the fee or not, and he has doubtless also a remedy at common law for the disturbance of his easement.³

§ 106. Injury to trees along the roadside.—One of the customary rights of an owner of land upon a highway is to maintain shade trees upon or overhanging the sidewalk, subject to the free use of the land for the purposes of a street; and whether such trees may be trimmed or even cut down without the con-

¹ *Tissot v. Great Southern Tel. Co.*, Omaha St. Ry. Co., 53 Neb. 631, 74 N. 39 La. Ann. 996, 3 S. Rep. 261 (1887), W. Rep. 67.
2 Am. El. Cas. 286.

² *H. Clausen & Sons' Brewing Co. v. B. & O. Teleg. Co.* (N. Y., Van Brunt, J., 1884), 12 Am. El. Cas. 210 (telegraph poles five feet in diameter); *Zehren v. Milwaukee Elect. Ry. & Light Co.* (Wis.), 74 N. W. Rep. 538; *Jaynes v.*
³ See *Gay v. Mutual Union Teleg. Co.*, 12 Mo. App. 485, 1 Am. El. Cas. 427; *Forsyth v. B. & O. Teleg. Co.*, 12 Mo. App. 494; *Julia Building Ass'n v. Bell Teleph. Co.*, 88 Mo. 258, 1 Am. El. Cas. 801.

sent of the land-owner for the purpose of making way for a telegraph line depends to some extent upon the question whether the use of such line is one of the purposes for which a street may properly be used without compensation to the land-owner. If the land in the street may not be taken for the purpose of planting the poles, the trees may not be cut in order to make room for the wires; but if, on the other hand, the street may be used for a telegraph line without the consent of the land-owner, then, since the right to maintain the trees is subject to the proper public uses of the street, it is lawful to cut or even remove the trees if the proper construction of the line makes it necessary. The right, however, is limited to what is necessary, and the telegraph company would be liable for wanton injury to the trees; and if the cutting were not justified by the necessities of the case, the land-owner would have a right of action for consequential injury to his land, and for injury to the trees themselves as appurtenant to his land. In a case in Illinois¹ already referred to, where it was held that the telegraph line was a new use of the highway, the trimming of a hedge and of trees therein was regarded as one of the acts by which the rights of the plaintiff were infringed; and in a later case, in Ohio,² it was held the use of post-roads for telegraph lines was subject to all the rights of the land-owners, and that the trial judge was right in charging the jury that the "land-owner had the right to have the trees remain and grow there without injury, whether such injury was necessary or not to the use of the lines of the telegraph company." So also in Mississippi³ it was held that under a statute empowering county boards of supervisors to permit telegraph companies to put up lines in highways, they acquired no power to permit the removal of trees or branches along the side of the road.⁴

On the other hand, in the supreme court of Alabama and in the federal court in that state,⁵ it has been held that irrespect-

¹ Board of Trade Teleg. Co. v. Barnett, 107 Ill. 507, 1 Am. El. Cas. 505.

28 N. Y. Supp. 113, 4 Am. El. Cas. 224 (1894).

² Dailey v. Ohio, 51 Ohio St. 348, 24 L. R. A. 724, 5 Am. El. Cas. 186 (1894).

⁵ Southern Bell Teleph. Co. v. Francis & Allen, 109 Ala. 224, 6 Am. El. Cas. 160, 19 S. Rep. 1 (1894); Same v.

³ Clay v. Postal Teleg. Cable Co., 70 Miss. 406, 11 S. Rep. 658, 4 Am. El. Cas. 224 (1892).

Constantine, 61 Fed. Rep. 61, 4 Am. El. Cas. 219.

⁴ McCruder v. Rochester Ry. Co.,

ive of the question whether the telegraph line is a new burden, and assuming that the land-owner holds the fee of the land to the middle of the street, his ownership of the trees is subordinate to the powers of the municipality in providing for all public uses, and that a telegraph company cutting trees under municipal direction is not liable in trespass to the land-owner, although it might be liable for unnecessary injury and for consequential damages to the property. In these cases one of the wires was used for the purposes of a municipal fire-alarm.¹

It is generally agreed, however, that whether or not the electric company may cut the trees so far as it may be necessary for the proper construction of the line, yet it is liable in damages or even on indictment for unnecessary or wanton injury to the shade trees along the roadside. It was so held in Louisiana, where shade trees are of special value, in a case where two fine magnolias overhanging a sidewalk were badly mutilated;² and in other cases in states where the climate is colder, damages, and even punitive damages, have been allowed for reckless and unnecessary injury to the trees, and the companies have been held liable for the acts of their servants in this matter, even though done in disobedience to orders.³ In Connecti-

¹ In New Jersey the same principle was applied in the case of an electric railway. *Dodd v. Consolidated Traction Co.*, 57 N. J. L. 482, 31 Atl. Rep. 990, 5 Am. El. Cas. 201 (1895). The court said: "The boughs of trees that were trimmed overhung the street, and were subject to removal by the municipal authorities whenever the public exigency or convenience required it. The city had conferred on the defendant the right to extend its wires in the usual mode along the streets; and such authority involved by implication the competency to do whatever was reasonably necessary to effect the end in view; but on the other hand, it was held in another case that the grant to the electric railway company is not *ipso facto* a grant of the right of the township to the trees in the streets, and does not divest the

township of its power to control the company with respect to the use of the trees. *Consolidated Traction Co. v. East Orange*, 38 Atl. Rep. 803. In New York it was held that the permission given to an electric railway company to construct its line in the street was no defense to an action of trespass by the land-owner for cutting the shade trees growing on the sidewalk. *McCruden v. Rochester Ry. Co.*, 28 N. Y. Supp. 1135, 4 Am. El. Cas. 224 (1894).

² *Tissot v. Great Southern Teleph. & Teleph. Co.*, 39 La. Ann. 996, 3 S. Rep. 261, 2 Am. El. Cas. 286 (1887).

³ *Gorham v. East Chester Elect. Co.*, 80 Hun, 290, 30 N. Y. Supp. 125, 5 Am. El. Cas. 199 (1894); *Hoyt v. So. New Eng. Teleph. Co.*, 60 Conn. 385; *So. Bell Teleph. Co. v. Francis & Allen*, 19 S. Rep. 1, 6 Am. El. Cas. 160; *Poston v. Cumberland Teleph. &*

cut, where the statute giving permission to a telephone company to use the highway imposes the condition that it shall not injure any trees without the consent of the owner, it has been held that the selectmen cannot give authority to cut the trees, and that the necessity for cutting them does not justify the act as against the owner;¹ and in Canada, under such a statute, it has been held that an action might be maintained in the absence of anything to rebut the presumption of the ownership to the middle of the street, or to show that the street was laid out before the passage of any expropriation act;² and where the statute provided that the telegraph company must not cut down or mutilate any shade trees unless it should be necessary, a plea that the company thought it necessary was held to be insufficient. The court said the defendant must allege and prove the necessity of the act complained of.³ If the agent of the company, acting under orders to cut such trees as may be necessary, make an error of judgment and cut trees which he has no right to cut, it has been held that the company is liable because the act of the agent is done in the course of his employment.⁴

Teleph. Co., 94 Tenn. 696, 5 Am. El. Cas. 203 (1895); *Postal Tel. Co. v. Lenoir*, 107 Ala. 640, 18 S. Rep. 266, 6 Am. El. Cas. 167, note; *Postal Teleg. Co. v. Brantley*, 107 Ala. 683, 18 S. Rep. 321.

¹ *Bradley v. So. New Eng. Teleph. Co.*, 66 Conn. 559, 34 Atl. Rep. 499, 6 Am. El. Cas. 152 (1895).

² *O'Connor v. Nova Scotia Teleph. Co.*, 22 Canada Sup. Ct. Rep. 276.

³ *Gilchrist v. Dominion Teleg. Co.*, Sup. Ct. New Brunswick, 3 Pugsley & Burbridge, 553, affirmed by Sup. Ct. of Canada, 2 Am. El. Cas. 298, note.

A grant of a right of way for a telephone line over a street does not confer the right to enter private

property and cut the limbs of trees, although the limbs project over the pavement. *Memphis Bell Teleph. Co. v. Hunt*, 16 Lea (Tenn.), 456, 57 Am. Rep. 237.

⁴ *West. Union Teleg. Co. v. Satterfield*, 34 Ill. App. 386, 2 Am. El. Cas. 296 (1889). A lineman cutting trees under orders is not guilty of malicious mischief. *Commonwealth v. Smith* (Pa.), 6 Am. El. Cas. 167, note (1881). A telephone company, in putting up a pole in a place designated by the mayor, cut a hole in an awning, and it was held liable in damages, but not exemplary damages. *Erie Teleg. & Teleph. Co. v. Kennedy*, 80 Tex. 71, 15 S. W. Rep. 704 (1891).

CHAPTER IX.

RIGHTS OF ABUTTING OWNERS—ELECTRIC-LIGHT WIRES.

§ 107. In view of the purpose of the use, electric-light wires may be analogous to gas pipes rather than to telegraph lines.— Since the purpose for which the wires are used is an important element in the decision of the question whether they are a legitimate use of the streets, it is obvious that the decisions in regard to the telegraph and telephone may not apply to the poles and wires for electric lighting. The poles may be the same and the wires may be more dangerous, and yet the purpose of the use may be such as to bring the electric-light wires plainly within the necessary uses of a street, while the telegraph and the telephone may remain entirely outside of the uses which the courts allow to be proper.

Electric-light wires are, like gas pipes, a means of furnishing light from a central source of supply, and whether they are carried in tubes under the street, or strung on poles overhead, it would seem that their legal relations to the streets and highways must be analogous to those of gas pipes, and that it is safe to refer to the law governing gas pipes for the principles applicable to the electric-light wires. It would seem to be clear that the rights of the abutting owner must be the same with respect to one as to the other, and that if the laying a gas pipe in a city street or country highway is or is not an additional servitude on his land, the same would be true of laying a tube for electric-light wires, or placing posts in the ground for carrying the wires overhead.

There is, indeed, a difference between pipes underground, whether for gas or electricity, and posts and wires above the surface, in that the latter are to some extent an obstruction of the street; but the obstruction of a street is a public injury, and affects private rights only so far as it affects the right of ingress and egress, and the use of the street in connection with the adjoining land. If the public authorities allow the obstruction, the land-owner has no right to complain unless it dimin-

ishes the benefits conferred on his land by the opening of the street. If the value of his adjoining land is affected, he is entitled to compensation for the obstruction; but so far as his right is based upon his ownership of the soil in the street, there is no difference between a tube underground and posts and wires in and above the surface; and if this right depends upon whether or not there is a perversion of the uses of a street, there is a close analogy, as I have said, between gas pipes and tubes or overhead wires for electric lighting.

§ 108. Whether gas pipes may be laid in country roads or city streets without compensation.—It has been held by the court of appeals of New York¹ that a gas company has no right to lay down a main line of gas pipe in a country highway without the consent of the owner of an adjoining farm or compensation made to him. Such a use of the street, the court said, would interfere with the soil and freehold to a greater extent than was ever contemplated when the land was taken for the ordinary purposes of a highway, but the court conceded that there might be a distinction in this respect between the street of a city and a highway in the country.

With regard to cities, Judge Dillon, in his work on *Municipal Corporations*, says it seems to him to be clear that the use of the streets under legislative or municipal sanction for the purpose of laying down gas pipes or other pipes for the purpose of supplying the city and its inhabitants with light is a legitimate use of the streets, for which the abutting owner is not entitled to compensation. "Such," he says, so far as he knows, "is the general understanding of the public and the profession."²

So also Mr. Lewis, in his work on *Eminent Domain* (§ 129), says: "Gas is not, like water, a necessity, in the sense of being absolutely indispensable, but it has become a practical necessity in all urban communities. The right to lay gas pipes in the

¹*Bloomfield & R. Nat. Gasl. Co. v. Calkins*, 62 N. Y. 386 (1875).

In England it has been held that gas pipes cannot be laid in a highway without express legislative sanction. *Regina v. Sheffield Gas Co. (Ct. of Q. B., June 4, 1853)*, 22 Eng. Law & Eq. 200; *Galbreath v. Armour*, 4 Bell App. Cas. 374; *Ellis v. Sheffield Gas*

Co., 23 L. J. Q. B. 42; *Queen v. Charlesworth*, 16 Q. B. 1012; *Queen v. Train*, 9 Cox Cr. Cas. 180; *Thompson v. Sunderland Gas Co.*, L. R. 2 Ex. Div. 429. See *Boston v. Richardson*, 13 Allen, 146, 160, per Gray, J.

²*Dillon's Mun. Corp.* (4th ed.), § 691, note. See also *Elliott on Roads and Streets*, p. 305.

streets of cities and villages has never been questioned, but has often indirectly received judicial sanction. But a country highway cannot be used for the purpose of conveying natural gas to a distant city. This is an additional burden for which compensation must be made."

Mr. Lewis refers to cases¹ and proceeds to make an application of the principle so as to include wires for electric lighting. He says: "Within the principle of the foregoing cases would be the laying of pipes in the streets for the purpose of conducting and distributing gas or steam for heating, or the laying of subterranean cables or wires for supplying electricity, either for lighting or other general use."² So, poles may be set and wires strung in a street for the purpose of lighting the same with electric light, or operating a fire-alarm, or aiding the police service."³

§ 109. **Distinction between urban and rural easements.**⁴—There is certainly a difference with respect to the uses to which they would ordinarily be put between city streets and country roads. "With reference to the latter," Judge Dillon says, "all the public requires is the easement of passage and its incidents; . . . but with respect to *streets in populous places*, public convenience requires more than the right to pass over and upon them."⁵ With the rapid growth of population around the large cities, it is not always easy to distinguish between city streets and country roads. Suburban roads soon require the conveniences of city streets; and as electric wires are not often carried

¹The cases cited are *Story v. N. Y. Elev. R. R. Co.*, 90 N. Y., at p. 161; *West v. Bancroft*, 32 Vt. 371; *Thompkins v. Hodgson*, 2 Hun, 146; questioned in *Boston v. Richards*, 13 Allen, 146, 160. Also as to natural gas in a country highway. *Bloomfield, etc. Gasl. Co. v. Calkins*, 62 N. Y. 386; *S. C.*, 1 *Thomp. & Cook*, 541, 549; *Sterling's Appeal*, 111 Pa. St. 35.

²This probably refers to electric power; but it would seem to include the telephone, which is now so generally used.

³*Lewis' Em. Dom.*, § 130. The cases cited in support of this paragraph are *Carli v. Railroad Co.*, 28 Minn., at

p. 376; *People v. Thompson*, 65 How. Pr. 407. See also observations on the power of municipalities to grant electric-light companies the right to use the streets, *supra*, ch. II, § 29, with the cases there cited.

⁴As to the distinction between urban and suburban servitudes with reference to the use of the streets, see *Elliott on Roads and Streets*, ch. 18; *Angell on Highways* (3d ed.), § 91e; *Eels v. Am. Teleph. & Teleg. Co.*, 143 N. Y. 133, 5 *Am. El. Cas.* 92, per *Peckham, J.*; *Palmer v. Larchmont Electric Co. (N. Y.)*, 6 *App. Div.* 12, 6 *Am. El. Cas.* 128.

⁵2 *Dill. Mun. Corp.* (4th ed.), § 688.

where there are so few houses that the light is not needed along the line of the street, it is hardly necessary to decide whether they would be an additional servitude upon the land in such a case. It is pretty safe to say that, if the poles and wires may be used in city streets without compensation, they may be used in the same way wherever they are needed for the same reason; and, on the other hand, they might well be called an additional burden if the road were merely used as a convenient line for extending the wires from one town to another, so that the wires cannot be said to be intended for the use of those who travel upon or live beside the road.¹

In a case in Pennsylvania where poles and wires were set up along a rural highway for the purpose, it would seem, of lighting private buildings, it was held by a local court in 1892² that an injunction must be issued unless compensation were made to the abutting land-owners. A distinction was taken between this case and that of the electric railway on the ground that the latter was in furtherance of the use of the highway for public travel, while the use which an electric-light company makes of a highway has no connection with the purposes of a public road, and it was likened rather to the case of a gas-pipe carrying natural gas from a well to a city some miles away,³ in which it was held that compensation must be made to the land-owner.

§ 110. Pipes or poles and wires for lighting the streets a proper use wherever they are needed for that purpose.— It seems to be well settled that wherever a local government, whether it be a village, a borough or a city, has power, with authority from the legislature, to provide for lighting the streets, and either to lay down gas pipes or set up poles with electric wires for that purpose, an abutting land-owner is not entitled to compensation for the mere use of the soil, or for

¹ It has been decided in *Indiana Ry. & Corp. L. J. 242*. See ch. VIII, § 19, p. 200.

² *Haverford Electric Light Co. v. Hart*, 13 Pa. Co. Ct. Rep. 369, 4 Am. El. Cas. 148.

³ *Sterling's Appeal*, 111 Pa. St. 40; *McDevitt v. People's Nat. Gas Co.*, 160 Pa. St. 367, 28 Atl. Rep. 948.

Alb. L. J. 208, 24 N. E. Rep. 1066, 8

anything except injury to his easement, or damages arising from negligent construction.¹

§ 111. Cases.—In *Johnson v. Thomson-Houston Co.*,² it was held that where a village has by law the control of streets, the village may authorize the erection of poles therein for the purpose of lighting the streets, and that the fact that a pole is also used for private purposes does not entitle the land-owner to have it removed, so long as it is reasonably necessary and proper for the public service. On the other hand, in a case in Ohio, where the public purpose of the light does not appear to have been involved, it was held that, even though the fee of the land be in the public, the city cannot, without obtaining the consent of an abutting owner, authorize an electric-lighting company to plant a pole in front of his land.³

Judge Haight, of the New York superior court, in 1883,⁴ declined to interfere with poles and wires put up in the streets of New York under an ordinance authorized by the legislature. It was objected that the statute was unconstitutional because

¹ Lewis on Em. Dom., § 129; 2 Dillon's Mun. Corp., § 691.

For cases in regard to gas pipes in streets, see *Milhau v. Sharp*, 15 Barb. 210; *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19 (1856) (exclusive franchise); *Smith v. Metrop. Gasl. Co.*, 12 How. Pr. (N. Y.) 187 (1855); *People v. Bowen*, 30 Barb. 24 (1859).

Pipes for conveying natural gas under a country roadway are an additional servitude. *Sterling's Appeal*, 111 Pa. St. 35; *Kincaid v. Ind. Nat. Gas Co.*, 121 Ind. 577 (1890), 24 N. E. Rep. 1066, 8 L. R. A. 602, 8 Ry. & Corp. L. J., 242, 42 Alb. L. J. 208. Especially if the pipes are used for fuel gas as distinguished from lighting. *Webb v. Ohio Gas Fuel Co.*, 16 Ohio Week. Bull. 121. But in this case it was held that if the land-owner does not own the fee in the street he is not entitled to damages unless the gas escapes.

Injunction granted to remove water pipes laid in a highway with-

out consent. *Goodson v. Richardson*, L. R. 9 Ch. App. 221.

² 7 N. Y. Supp. 716 (1890).

³ *McLain v. Brush Electric Light Co.*, 9 Bulletin (Cincinnati), 65, 1 Am. El. Cas. 483. The learned judge argues that if poles could be put up, they might be put up so as to be like a picket fence; but the question was not whether the defendants had a right to put up a picket fence, but a telegraph line, which is a very different thing; and if the poles were put too near together, the land-owner would have his remedy for injury to his easement of access. If the courts would bear in mind that the land-owner has a substantial right in the street as street, they would not have to trouble themselves so much over his rights in the land as land.

⁴ *People ex rel. Thompson v. Mo-Manus*, 65 How. Pr. 407, 1 Am. El. Cas. 554; *Tuttle v. Brush El. Ill. Co.*, 50 N. Y. Super. Ct. 464 (1883), 1 Am. El. Cas. 508.

it did not provide for compensation to the owners of abutting land. He said that lamp posts for lighting the streets were admitted to be a proper use of them, and that it seemed to him that planting the necessary poles for bearing the wires that transmit the electricity to the lamps was among the public uses to which the streets might properly be devoted.

The decision was approved in a case in the same court shortly afterwards, and it was held that the lighting of the streets was a purpose not inconsistent with the trust under which the city held them, and that poles and wires might properly be put up in one street for the purpose of lighting another.

But in a later case in the supreme court,¹ O'Gorman, J., at special term took a distinction between the lamp posts and the poles used for supporting the wires, and granted an injunction until it should be ascertained that they did not interfere with the access or light and air of the adjoining owner.

In another case in the supreme court² a preliminary injunction was allowed to stand against interfering with poles put up in the streets of a village to carry wires for the purpose of lighting a neighboring village as well as the village where they were, the complaint alleging that the poles formed a part of a line necessary for the lighting of the latter village under a contract; and another department of the same court, referring to this case, said: ³ "The legislature may authorize the use of the streets for other purposes than travel, and electric lighting is one of such purposes." And it was held that, in the absence of peculiar injury, no rights of the land-owner were affected by the erection of electric-light poles in a village street under lawful authority, and not for merely private purposes.

It has been held by the court of appeals that the Transportation Corporation Law, sections 60, 61, authorizing cities, vil-

¹ *Tiffany v. U. S. Illuminating Co.*, 67 How. Pr. 73, 1 Am. El. Cas. 629. See also *People v. Thompson*, 32 Hun, 93, 65 How. Pr. 407, 1 Am. Elec. Cas. 554.

² *Electric Constr. Co. v. Hefferman*, 34 N. Y. St. Rep. 436, 12 N. Y. Supp. 336 (1890). There was evidence of authority to put up the poles. They had been cut down before, and there was danger of their being interfered

with pending the suit. It was held that poles erected for electric lighting in a highway cannot be lawfully cut down by a private person as a nuisance obstructing the highway, even though they might be abated by action.

³ *Consumers' Gas & Elec. Light Co. v. Congress Spring Co.*, 61 Hun, 133, 3 Am. El. Cas. 211 (1891).

lages and towns to grant to electric-light companies the right to erect poles and wires in the streets, in such manner as the municipal authorities may determine, for the purpose of lighting the streets, and furnishing light, heat and power to public and private buildings, is not against public policy, since all abutting owners share in the benefit of the improvement which imposes the burden on the streets.¹

Vice-Chancellor Van Fleet of New Jersey, in a case already referred to,² speaking of the poles set up in the middle of the street for an electric railway, some of which were also used for lighting the street, said there could be no doubt that erections can be lawfully made in the streets for the purpose of lighting them, and that this use of the poles and wires would legalize their erection.

In Montana the supreme court³ in 1895, citing this chapter in the first edition of this book and referring to the cases there cited, held that poles and wires put up for the purpose of lighting the streets of a city were within the servitudes of a city street, and could be set up without compensation to the abutting owners, unless there were some substantial interference with the access to the land.

§ 112. Is there a distinction between wires used solely for public lighting and those used for private buildings also?—Some of these cases seem to suggest that there may be a difference between wires used for the public purpose of lighting a city, and wires used for some other purpose.

There is a case in New York in which this distinction is taken. The charter of an electric-lighting company gave it power to furnish light to the city corporation for the streets, and also to individuals for lighting private houses, and the court said the former might involve a public and ordinary use of the

¹Palmer v. Larchmont Electric Co., 158 N. Y. 231, 52 N. E. Rep. 1092 (1899); reversing 6 App. Div. 12, 39 N. Y. Supp. 522.

²Halsey v. Rapid Transit Ry. Co., 47 N. J. Eq. 380; ch. II, § 21.

³Loeber v. Butte Gen. Electric Co., 16 Mont. 1, 5 Am. El. Cas. 130.

For a discussion of the grounds of opposition of land-owners to the use

of the streets for electric lighting, see 2 Clifford & Richards' Locus Standi Reports, 251, 254 (1874) (English).

Poles and wires cannot be run along a private alley for the benefit of one land-owner without the consent of the others. Carpenter v. Carpenter, 178 Ill. 29, 52 N. E. Rep. 973 (1899).

streets, while the latter would involve a private use; and it was held that the company must show that the pole in question was necessary or highly convenient for the public as well as the private use, or else an injunction granted would be allowed to stand.¹ The distinction, however, is not made with respect to pipes for lighting by gas. It seems to be now conceded that city streets may be used for gas pipes without compensation to abutting owners, whether it be for the purpose of supplying private houses or for the purpose of lighting the streets and public places.² The pipes used for both purposes are generally the same; the purpose is, in a sense, necessary and general, and the streets are the most convenient if not the only means of access. The same conditions apply to the electric light; the only difference is in the additional poles required for carrying the wires, and it can hardly be maintained that they make a difference in principle. If the purpose is a public purpose for which the streets may be used, it would seem that compensation could not properly be required for the mere occupation of the soil by a pole any more than by a gas pipe.

§ 113. Liability for actual interference with rights and privileges of adjacency to highway.—It does not follow that the land-owner is without redress if poles be put up so as to interfere with his access, or even so as to be inconvenient or unsightly, or if wires be hung so as to be dangerous, or so as to prevent ready access in case of fire. The land-owner has a right to the free use of the highway for access and other purposes relating to the pleasant enjoyment of his land, and all these rights and privileges are under the protection of the courts.³

¹ *Tiffany v. U. S. Illuminating Co.*, 50 N. Y. Super. Ct. 280 (1885). See also *Tuttle v. Brush Ill. Co.*, 50 N. Y. Super. Ct. 464.

² Ch. IX, § 108, *supra*. See also opinion of the justices, *Re Manufacture of Gas and Electric Light by Mu-*

nicipal Corporations, 150 Mass. 592, 8 L. R. A. 487, with note, and *Crooke v. Flatbush Water Works Co.*, 29 Hun, 245.

³ *Tiffany v. U. S. Illuminating Co.*, 67 How. Pr. 73.

CHAPTER X.

RIGHTS OF ABUTTING OWNERS—THE ELECTRIC RAILWAY.

§ 114. **Opposition to the introduction of the trolley system.**—The latest use of poles and wires in the streets is to supply the motive power for electric railways. Wires are strung not only along the street, but across it also, and poles are set along the side of the footpath, or else along the middle of the street. The cars run fast, and are dangerous to the unwary, the wires are charged with a dangerous current, and the poles disfigure the streets. For these and other reasons there is, in many cases, vigorous opposition to the introduction of the overhead or trolley system, and this opposition is sometimes made by or through the owners of property along the line of the street. It is important, therefore, both for property owners and the railroad companies to know what are the rights of the owners of abutting land with respect to the placing of poles and wires in the streets for the electric railway.

§ 115. **Peculiar rights of the land-owners in the street.**—There is no doubt that the land-owner has a peculiar interest in maintaining the use of the street for the proper purposes of a street, and that he has property rights in the use of the street as such in connection with his land. He has the right of free access to the street, and the right to receive light and air upon his land from over the street, and all the advantages of owning land upon a public highway. These are rights in the nature of an easement, and belong to him as owner of the land and not merely as a part of the public use. In addition to these rights, the abutting land-owner may have a title to the land to the middle of the street, or, if the fee is in the public, it is held in trust for street purposes, so that he still has an interest in preventing a perversion of the purposes for which it was taken.

§ 116. **Two questions to be considered — Rights of adjacency and perversion of the uses of the street.**—In inquiring, therefore, whether the land-owner is entitled to compensation

for the use of the streets for the electric railway, there are two questions to be considered: first, whether he suffers injury with respect to his rights in the use of the street as owner of the abutting land; and secondly, whether the new use is an additional servitude upon the land in the street owned by him, or a violation of the trust upon which the land is held by the public for the purposes of a street.

With respect to the first point there is, first, a question of fact whether there is in this case, as it is held there is in the case of elevated railroads, actual damage in the way of interference with access and light and air; and secondly, a perversion of use by which the owner is deprived of some of the advantages of his adjacency to a public street; and with respect to the second point, the question is also whether there is a perversion of the use or such a new use as in either case to impose a new servitude upon the land, or to violate the trust upon which the land is held by the public.

These distinctions having been pointed out, we may reserve the question of actual damage and consider the question of the change of use of the street with respect to the ownership of the land, and also with respect to the right to use the street as a street.

§ 117. The decisions relating to the telegraph have not determined the law with respect to the electric railway.—Judge Dillon, in the last edition of his book on Municipal Corporations,¹ refers to a case in Rhode Island, decided while his book was in press, in which it was held that the erection of poles in the streets, with wires, for the purpose of propelling street cars by electricity, did not entitle the owner to compensation.² The court had distinguished this case from those relating to telegraph and telephone wires by saying that these are not used to facilitate the use of the streets for travel and transportation, “whereas the poles and wires of the railroad company are directly ancillary to the uses of the street as such, in that they communicate the power by which the cars are propelled.” Judge Dillon threw discredit upon this decision

¹ 2 Dill. Mun. Corp., § 734, note (4th ed.). Am. R. R. & Corp. Rep. 44, with note, 7 L. R. A. 205, with note (January 25, 1890).

² Taggart v. Newport Street R. R. Co., 16 R. L. 668, 19 Atl. Rep. 326, 2

by saying: "The distinction last mentioned is so fine as to be almost impalpable, and it suggests serious doubts whether both conclusions are sound and reconcilable. The general subject awaits further development and settlement." This remark was made in 1890, and the subject since that time has been rapidly developed and is now nearly settled. The law has followed close upon the progress of invention, and with the general application of electricity many of the courts have reached definite conclusions with respect to the rights of abutting owners. They have not always inquired whether or not there is a sound distinction between the use of the street for the telegraph and the use of it for the railway wires, or whether both alike are proper uses of a street. The conclusions have been reached rather by comparing the electric railway with the older forms of railway, and considering whether or not the use of the poles, wires and electric motors made any change in the character of the use of the streets.

§ 118. Is the electric railway a new burden or a perversion of the uses of the street — Comparison with other railroads on the street.— The question is, whether the poles and wires, and the street railway operated by electricity, constitute a new burden upon the land or a perversion of the true uses of a street, so as to entitle the adjacent owner to compensation without regard to actual damages.

The electric railway, as now generally used, is applied to the same purposes and operated in the same manner, with respect to the running and stopping of the cars, as the horse railway. It is a street railway, or what is called a city passenger railway, operated with a new motive power, and with new appliances, but for the same purposes as the old form of street railway.

It seems probable that electricity will soon be used to propel cars at a high rate of speed, and on lines running along country roads the electric motor even now takes the place of the steam dummy, if not of the locomotive. Hence, it is obvious that the electric railway is analogous to other railways and resembles one or another kind according to the uses to which it is put. It is important, therefore, to inquire what has been decided with respect to use of the streets by the older forms of railway, whether one or another has been held to be an additional servi-

tude, and for what reason. We may in this way obtain a rule and a reason with respect to the various uses of the streets by the electric railway. The subject has been fully discussed by the text writers, and I need only quote their conclusions and refer to the cases.

§ 119. Horse railroads are generally held to be a proper use of the street imposing no new burden — Dissenting opinions.— There is a very general agreement of authorities that the use of a street for a horse railroad is a legitimate use of it for public travel consistent with the purposes for which it was laid out, and does not impose a new burden upon the land. In many of the older cases a distinction is made between cases in which the fee of the street is in the abutter and those in which the fee is in the city; but this distinction is not now generally approved, and it seems to be accepted that in either case a horse railroad authorized by statute is not inconsistent with the rightful use of a street.¹

¹Hinchman v. Paterson H. R. R. Co., 17 N. J. Eq. 75; Hogencamp v. Same, 17 N. J. Eq. 83; Jersey City & Bergen R. R. Co. v. Jersey City & Hoboken H. R. R. Co., 20 N. J. Eq. 61; Paterson & Passaic H. R. R. Co. v. Paterson, 24 N. J. Eq. 158; West Jersey R. R. Co. v. Cape May & S. L. R. R. Co., 34 N. J. Eq. 164; Brooklyn City R. R. Co. v. Coney Island R. R. Co., 35 Barb. 364; People v. Kerr, 27 N. Y. 188; Kellinger v. Forty-second St. etc. R. R. Co., 50 N. Y. 206; Elliott v. Fairhaven & Westville R. R. Co., 32 Conn. 579 (at *nisi prius*); Cincinnati R. R. Co. v. Cummins ville, 14 Ohio St. 523; Hussner v. Brooklyn City R. R. Co., 114 N. Y. 433, 21 N. E. Rep. 1003, 11 Am. State Rep. 679, with note; Hobart v. Milwaukee City R. R. Co., 27 Wis. 294; Clinton v. Clinton & Lyons H. R. R. Co., 37 Iowa, 61; Stanley v. Davenport, 54 Iowa, 463; Stange v. Hill & West Dubuque Street R. R. Co., 54 Iowa, 669; Sears v. Marshalltown St. R. R. Co., 65 Iowa, 742; Eichels v. Evansville Street R. R. Co., 78 Ind. 261; Savannah v. Savannah & Thunderbolt R. R. Co., 45 Ga. 602 (but in Georgia, where the constitution directs that property shall not be taken or damaged without compensation, an action may be maintained by an owner whose property is damaged by a street railway, even though it is not a new use of the street. Campbell v. Met. R. R. Co., 82 Ga. 320, 9 S. E. Rep. 1078); Carson v. Central R. R. Co., 35 Cal. 325; Market St. R. R. Co. v. Central R. R. Co., 51 Cal. 583; Finch v. Riverside & Arlington R. R. Co., 87 Cal. 597, 25 Pac. Rep. 765; Brown v. Duplessis, 14 La. Ann. 843; Piddicord v. Baltimore, etc. R. R. Co., 34 Md. 463; Hiss v. Baltimore, etc. R. R. Co., 52 Md. 242; Hodges v. Baltimore Pass. R. R. Co., 58 Md. 603; Briggs v. Lewiston & Auburn R. R. Co., 79 Me. 363; Attorney-General v. Met. R. R. Co., 125 Mass. 515; Hobart v. Milwaukee City R. R. Co., 27 Wis. 194, 9 Am. St. Rep. 461, with note; Randall v. Jacksonville St. R. R. Co., 19 Fla. 409; Grand Rapids & I. R. Co. v. Heisel, 28 Mich. 62; People v. Fort Wayne &

Mr. Lewis, in his work on Eminent Domain, says: "It has been determined in numerous decisions, and without dissent, except in New York, that the use of the street by a horse railroad, constructed and operated in the ordinary manner, falls

E. Ry. Co., 92 Mich. 522, 52 N. W. Rep. 1010; Chicago, B. & Q. R. Co. v. West Chicago St. Ry. Co., 156 Ill. 258, 40 N. E. Rep. 1008; Trelford v. Coney Island & B. R. Co., 39 N. Y. Supp. 20; East End R. R. Co. v. Doyle, 88 Tenn. 747, 13 S. W. Rep. 936; N. R. Co. v. Garside, 10 Kan. 552; O. O. C. & C. G. R. R. Co. v. Larson, 40 Kan. 301; Hiller v. A. T. & S. F. R. R. Co., 28 Kan. 635; Wichita & C. R. Co. v. Smith, 45 Kan. 264, 25 Pac. Rep. 623; Railway Co. v. Cuykendahl, 42 Kan. 234, and other Kansas cases there cited. In Kansas, however, it is held that a steam railroad is not an additional burden, and that the landowner cannot recover compensation unless there has been a practical obstruction of the street and he is virtually deprived of access to his land. The fee of the land in the streets is in the public. The same is held in Missouri. Porter v. Railroad Co., 33 Mo. 128; Lackland v. Railroad Co., 34 Mo. 259; Tate v. Railroad Co., 64 Mo. 150; Randle v. Railroad Co., 65 Mo. 325; Railroad Co. v. St. Louis. 66 Mo. 228.

See also Angell on Highways (3d ed.), §§ 91-91e; 2 Dill. Mun. Corp. (4th ed.), § 722 and note; Lewis on Em. Dom., § 124 and note; Mills on Em. Dom., § 205; Elliott on Streets, pp. 530-532; Randolph on Em. Dom., § 402; Lewis' Note to Taggart v. Newport St. R. R. Co., 1 Lewis Ann. Amer. R. R. & Corp. Rep. 55. See, however, note on page 57. As to tramways in England and the grounds of opposition by frontagers and non-frontagers, see 3 Cliff. & Rich. Locust Standi Reports, 30, 397; 2 Cliff. & Rich. 106; Rich. & Michael, 268. For references to many cases on the use of the streets for railroad purposes, see note to Stanley

v. Davenport, 37 Am. Rep. 224, and Theobald v. Louisville R. R. Co., 14 Am. St. Rep. 569; and also note to Vose v. Newport St. R. R. Co., 46 Am. & Eng. R. R. Cas. 91. But if a street railway is laid along the margin of a sidewalk so as to disturb the grade, and so as to be in fact an obstruction to the convenient access to the complainant's house, compensation must be made. Street Ry. v. Cummins, 14 Ohio St. 524; Railway Co. v. Lawrence, 38 Ohio St. 41; Campbell v. Met. R. R. Co., 82 Ga. 320, 9 S. E. Rep. 1078; Wichita & C. R. Co. v. Smith. 45 Kan. 264, 25 Pac. Rep. 623, and Kansas cases cited; Lackland v. Railroad Co., 34 Mo. 259; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62; Nichols v. Ann Arbor & Y. St. R. R. Co., 87 Mich. 361.

In the following cases it has been held that an ordinary horse railroad is an additional burden upon land taken for streets, and that the owner is entitled to compensation. Craig v. Rochester City & B. R. R. Co., 39 N. Y. 404. (In this case, unlike the Kerr case, *supra*, the fee was in the abutter.) Theobald v. Louisville, etc. R. R. Co., 66 Miss. 279, 14 Am. State Rep. 564 (with note); Indianapolis B. & W. R. R. Co. v. Hartley, 67 Ill. 439. Earlier cases in Illinois held otherwise where the fee was in the public. The distinction is maintained in this case. The case was approved and followed in Barnett v. Board of Trade Teleg. Co., 107 Ill. 507. See, however, Wiggins v. East St. Louis Ferry Co., 107 Ill. 450. The same distinction is made in Tennessee. Iron Mountain R. Co. v. Bingham, 87 Tenn. 522, 11 S. W. Rep. 705; East End R. R. Co. v. Doyle, 88 Tenn. 747, 13 S. W. Rep. 936. See, however, a strong

within the purpose for which streets are established, and, consequently, that for any damage resulting from such use to the abutting owner he can recover no compensation, whether the fee is in the public or not.”¹

Mr. Lewis, however, goes on to say that in his own opinion, although the difference between the ordinary horse railway and the ordinary steam railway is obvious, yet the difference is only one of degree. The essential characteristic of both roads is that an exclusive franchise is granted in the soil of the street, and that if the principle of the horse railroad cases is sound, then a street may be so filled with tracks as practically to exclude all other travel and traffic from the streets.² The law, however, is settled by the great weight of authority that the street railway is not in itself an additional burden, and the proviso is that it shall leave the land-owner free right of use of and access to his land.

Judge Cooley, in his work on Constitutional Limitations (§ 688), says: “When land is dedicated for a street, it is unquestionably appropriated for all the ordinary purposes of a street; not merely for the purposes for which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use of heavy carriages which run upon a grooved track; and the appropriation of important streets in large cities for their use is not only a frequent necessity which must be supposed to have been contemplated, but it is almost as much a matter of course as the grading and paving.”

Mr. Angell, Judge Dillon and Mr. Mills reach the same conclusion.³

§ 120. Steam railroads not within the proper uses of the street — Reasons given for the distinction.—It is equally well settled in most of the states that the ordinary steam railroad, as now conducted, is not within the purposes for

opinion that the question of who owns the fee is of little consequence in *McQuaid v. Portland & V. R. R. Co.*, 18 Oreg. 237, 23 Pac. Rep. 899, 1 Am. R. R. Corp. Rep. 34.

¹ Lewis' Em. Dom., § 124. See also Mr. Lewis' discussion of the legiti-

mate uses of streets. 6 Am. R. R. Corp. Rep. 299-357.

² See also the dissenting opinion of Earl, J., in *Story v. New York Elev. R. R. Co.*, 90 N. Y. 179-189.

³ Mills on Em. Dom., § 205; 2 Dill. Mun. Corp., § 722; Angell on Highways, §§ 91-91e.

which a street is dedicated, and does impose an additional burden upon the abutting owner.¹ The same cases which

¹With respect to steam railways we may refer to Lewis on Em. Dom., § 115 and note, where the cases are collected and arranged by states with explanations. See also *Springfield v. Conn. River R. R.*, 4 Cush. 63; *Starr v. Camden & Atl. R. R. Co.*, 24 N. J. L. 592; *Hinchman v. Paterson Horse R. R. Co.*, 17 N. J. Eq. 75; *Jersey City & Bergen R. R. Co. v. Jersey City & Hoboken R. R. Co.*, 20 N. J. Eq. 61; *Citizens' Coach Co. v. Camden Coach Co.*, 33 N. J. Eq. 267; *Halsey v. Rapid Transit St. Ry. Co.*, 47 N. J. Eq. 380, 21 Atl. Rep. 859; *Van Horne v. Newark Pass. R. R. Co.*, 21 Atl. Rep. 1034, 48 N. J. Eq. 332; *Fla. Southern R. R. Co. v. Brown*, 23 Fla. 104; *Gray v. St. Paul & Pac. R. R. Co.*, 13 Minn. 315; *Reichert v. St. Louis, etc. R. Co.*, 51 Ark. 491, 11 S. W. Rep. 696, 5 L. R. Ann. 183, with note, citing many cases; 38 Am. & Eng. R. R. Cas. 453; *D. & R. G. R. Co. v. Bourne*, 11 Colo. 59; *Weyl v. Railroad Co.*, 69 Cal. 203, 10 Pac. Rep. 510; *Ruttles v. Covington, Ky., Ct. of Appeals*, January 13. 1889, 10 S. W. Rep. 644; *Daly v. Georgia, etc. R. Co.*, 80 Ga. 793, 12 Am. St. Rep. 286, and note; *Dill Mun. Corp.* (4th ed.), §§ 701, 702, 703, 704, 722, 723, 725, and cases cited; Lewis on Em. Dom., § 636; *People v. Kerr*, 27 N. Y. 183 (1863); *Craig v. Rochester City & B. R. R. Co.*, 39 N. Y. 404 (1863); *Kellinger v. Forty-second, etc. R. R. Co.*, 50 N. Y. 206; *Story v. N. Y. Elev. R. R. Co.*, 90 N. Y. 122; *Lahr v. Met. Elev. R. R. Co.*, 104 N. Y. 268; *Redfield on Railways* (5th ed.), 314 *et seq.*, and notes; *White v. Northwestern & N. C. R. Co.*, 113 N. C. 610, 18 S. E. Rep. 330, 56 Am. & Eng. R. R. Cas. 706; *Cox v. L., N. A. & C. Ry. Co.*, 48 Ind. 178 (1874); *Delphi v. Evans*, 36 Ind. 90.

See also *Adams v. Chicago, B. & N. R. Co.* (1888), 39 Minn. 286, 39 N. W.

Rep. 629, 1 L. R. A. 493, with notes. The court held that an abutting owner has an easement in the street, independent of the fee, and that depriving him of this, to any extent, is a taking of private property. A steam railroad was held not to be a proper use of a street, and the land-owner was awarded damages; but these were confined to the operation of the road in front of the plaintiff's land, so as not to include damages common to the public.

This decision was affirmed in *Lamm v. Chicago, St. Paul & M. R. R. Co.*, 45 Minn. 71, 10 L. R. A. 268 (with note).

It was held that the easement goes beyond the middle line of the street. Damages from noise and jarring were excluded, because these do not affect the easement; but in *Gustavson v. Hamm* (Minn.), 57 N. W. Rep. 1054, it was held that the land-owner had a right of action for the pollution of the air by the operation of a railroad.

In Iowa it is held that the legislature may authorize the use of streets for railroads without compensation to the abutting owners. *Clinton v. Cedar Rapids & M. R. R. Co.*, 24 Iowa, 455. The statutes providing for compensation do not apply to street railways. The city council may authorize these without compensation. *Sear v. Marshalltown St. R. R. Co.*, 65 Iowa, 742. But compensation must be made for actual damage done by the construction and operation of the road in the street. *Stanley v. Davenport*, 54 Iowa, 463 (steam dummy); *Drady v. Des Moines & Ft. O. R. Co.*, 57 Iowa, 393; *Stange v. Dubuque*, 62 Iowa, 303; *Rinard v. Burlington & W. R. Co.*, 66 Iowa, 440; *Wilson v. Des Moines, O. & S.*

allow the horse railroad to be within the proper uses of a street declare that the steam railroad is not.¹ The reason for the dis-

R. Co., 67 Iowa, 569; McLean v. Chicago, L. & D. R. Co., 67 Iowa, 568.

There are cases in which it is held that the operation of a steam railroad, if authorized by law and municipal consent, does not entitle the land-owner to compensation, especially if he does not own the fee, unless it practically obstructs the street and deprives him of his right of access. This is the settled rule in Kansas. *Wichita & C. R. R. Co. v. Smith*, 45 Kan. 264, 25 Pac. Rep. 623; *Railway Co. v. Cuykendall*, 42 Kan. 234, 21 Pac. Rep. 1051, and cases cited. Also in Missouri, *Lackland v. Railroad Co.*, 34 Mo. 259; *Railroad Co. v. St. Louis*, 66 Mo. 228; *Julia Building Ass'n v. Bell Telephone Co.*, 88 Mo. 258-271, and cases cited; and it has been so held in California, *Montgomery v. Santa Ana & W. R. Co. (Cal.)*, 37 Pac. Rep. 786, 25 L. R. A. 654. In *Cosby v. Owenboro*, 10 Bush (Ky.), 288, it was held that building an embankment in the middle of the street for a railroad, leaving a passage-way from six to thirteen feet wide for vehicles, is not such an appropriation of the street as to give land-owners a right of action. See *Costigan v. Penn. R. R. Co.*, N. J. Sup. Ct., February, 1892, 15 N. J. L. J. 90. See also *Arbenz v. Wheeling & Harrisburg R. R. Co.*, 33 W. Va. 1, 5 L. R. A. 371, where it was held that an abutting owner was not entitled to an injunction against excavating a street for a railroad duly authorized so long as there was sufficient space on either side for the proper purposes of a street. See note to this case, 5 L. R. A. 371. In New York it is held that an abutter who does not own the fee has no right of action against a steam railroad com-

pany lawfully occupying a public street in such a manner as not to change the grade nor interfere with public travel; approving *Drake v. Hudson River R. R. Co.*, 7 Barb. 508; *Fobes v. Rome, W. & O. R. R. Co.*, 121 N. Y. 505; *Renning v. N. Y., L. E. & W. Ry. Co.*, 128 N. Y. 157.

In West Virginia it has been held that the owner of lands along a street on which a railroad was to be laid cannot obtain an injunction unless the injury will be such as entirely to destroy the value of the property so as to constitute a taking. *Yates v. West Grafton (Town of)*, 24 W. Va. 783, 12 S. E. Rep. 1075 (1891). The court relied on the language of Chancellor Williamson in *Morris & Essex R. R. Co. v. Newark*, 10 N. J. Eq. (2 Stock.) 352, decided in 1855, but it had not then been established by experience that steam railroads were inconsistent with other uses of the street within the lines of the railroad. See § 121, *infra*.

In Colorado, where, under the constitution and statutes, it is contemplated that the streets of Denver may be used for steam railroads, and that permission may be granted by municipal authority, the abutting owner is still entitled to compensation for this extraordinary and unusual use of the streets as compared with the use for local convenience and travel. *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247. See also *Gilbert v. Greeley*, S. L. & P. R. R. Co., 13 Colo. 501; *Union Pac. Ry. Co. v. Foley*, 19 Colo. Sup. Ct. 280, 35 Pac. Rep. 542; *Same v. Benson*, 35 Pac. Rep. 544, 19 Colo. Sup. Ct. 285.

¹ *Hinchman v. Paterson Horse R. R. Co.*, 17 N. J. Eq. 75; *Jersey City & Bergen R. Co. v. Jersey City & Ho-*

tion is not the motive power, but the mode of using the streets, the purpose for which the cars are used, and the effect of using them upon the other and ordinary uses of the streets, and upon the use of the adjoining land. Chancellor Green, in *Hinchman v. Paterson Horse R. R. Co.*,¹ said the use of land for a steam railway, and the use of it for an ordinary highway, were almost wholly inconsistent with each other, but with respect to the street railroads used as a part of the highway and in connection with it, he said the use of the land was almost identical with that of the ordinary highway, and went on to show that the use of the railroad could not interfere with the land-owner in the use of his property any more than an ordinary highway.

Chancellor Zabriskie, in *Jersey City & Bergen R. Co. v. Jersey City & Hoboken Horse R. Co.*,² referred to this and many other cases distinguishing street railroads from the ordinary railroads operated by steam. He said that steam railroads did not afford access to the land along which they passed, and that the land-owner whose land was taken acquired none of the benefits of a public highway to his land from the use of the street for such a railroad, but that in the case of street railroads it was different. "In general," he said, "the cars will stop in front of every door, and convey persons from any one point on their line to any other to which they may desire to go, and the great use or advantage of them is to those whose property is taken for the street, and whose lands adjoin it. . . .

boken Horse R. Co., 20 N. J. Eq. 61; 2 Dill. Mun. Corp., §§ 725 (576), 722 (573); *Hobart v. Milwaukee City R. Co.*, 27 Wis. 194 (1870); S. C., 9 Am. Rep. 461; *Ford v. Chicago & N. W. R. R. Co.*, 14 Wis. 616; *Springfield v. Conn. River R. R. Co.*, 4 Cush. 63.

For cases on horse and steam railways in streets, see notes 14 Am. St. Rep. 569, and 11 Am. St. Rep. 682; 36 Am. & Eng. R. Cas., n. 9; 38 Ibid. 452, n., 468, n.; 4 L. R. A. 623, n.; 32 Am. & Eng. R. Cas. 351, n. For an article on the right to construct and operate an elevated steam railroad on the other side of the street, see 27

Am. Law Reg. (N. S.) 1; and see also *Penn. R. R. Co. v. Lippincott*, 116 Pa. St. 472.

The construction of a toll-gate keeper's house within the lines of a highway, without the consent of the owner of the soil, is the imposition of an additional servitude, although the legislature had authorized the turnpike company to appropriate the highway. *Perkins v. Moorestown & C. Turnp. Co.*, 14 N. J. L. J. 197, 22 Atl. Rep. 180 (Chancery, N. J. 1891).

¹ 17 N. J. Eq. 75.

² 20 N. J. Eq. 61.

They are but means of using the public streets to a greater advantage for the very purposes for which they were laid out—free and quick transit from one part to another; they are the best and cheapest mode yet devised, and they do not hinder the use of the rest of the street for public travel, and hardly, and in a very small degree, obstruct travel on the part occupied by the tracks, except the few inches used for the iron rails.” And it was held that the state, or those to whom it has delegated the authority, has the right to set apart a certain portion of the street for a street railroad, if that road is to accommodate the public travel for which the street was designed.

It is worthy of note that before it was learned by experience that the use of the steam railroad in the streets was in fact exclusive, and was not consistent with the ordinary uses of a street, it was held in New Jersey that even this was only a new mode of travel to which the streets might be devoted. Chancellor Williamson, in his remarkable judgment in *Morris & Essex R. R. Co. v. Newark*,¹ in 1855, said: “While (the land) is preserved as a common public highway, the use of it does not belong to the owner of the fee any more than to any other individual of the community. The legislature, therefore, does not, by permitting the company to use the public highway in common with the public, take away from the land-owner anything that belongs to him. It is not a misappropriation of the way. It is used, in addition to the ordinary mode, in an improved mode for people to pass and repass.”

It was only when it was found that the steam railroad running through a town was not a mode of using the streets for travel within the city that the courts held that it was not a use for which the street had been dedicated, and that, although the right to use it so might be granted, compensation must be given to the land-owner.

§ 121. **Difference of opinion as to dummy steam engines.** Horse railroads having been held to be within the uses of a street, and steam railroads not, the question next arose whether the use of steam motors on street railroads imposed a new burden, and this was variously decided according to the views

of the courts upon the effect of such a change upon the use of the streets. In Iowa, for example,¹ it was held that steam motors authorized by a city to be used on the streets were a nuisance, and that the city was liable to a traveler for damages. In Minnesota, on the other hand, it was held² that the running of cars drawn by steam motors inclosed in cabs was a proper use of the streets in aid of public travel, and did not impose a new servitude.

The same thing was held in a case in Maine,³ when the court said: "The motor is not the criterion; it is rather the use of the street. A change of motor is not a change of use."

In *Williams v. City Electric Railway Co.*, in the United States circuit court for the district of Arkansas,⁴ it was held that a railroad operated in a city by steam motors was a street railway, within the meaning of a statute giving cities power to provide for the operation of street railways, and that it did not impose a new servitude. The court said: "The distinction attempted to be drawn between animal and mechanical power as applied to street railroads is not sound. The motor is not the criterion. It is the use of the street and the mode of that use;" and that if a railroad, whether operated by horse power or mechanical power, is in fact so operated as to be a nuisance, the land-owner has his remedy.

In Tennessee it has been held that the use of a steam motor drawing cars and running along a city street and five miles out into the country was, in fact, a new servitude. The court said that it was a question of degree, and depended on the manner in which the streets were used; but that in this case there were noise and smoke, the trains were longer and heavier, and the speed was greater than in the case of horse cars, and the use was practically inconsistent with other uses of the highway.⁵

In a case in Oregon⁶ relating to a railroad operated by a

¹ *Stanley v. Davenport*, 54 Iowa, 463, 17 Am. Rep. 216, with long note.

² *Newell v. Minneapolis*, Lyndale & M. R. R. Co., 35 Minn. 112, 59 Am. Rep. 303.

³ *Briggs v. Lewiston & A. Horse R. Co.*, 79 Me. 363 (1887).

⁴ 41 Fed. Rep. 556 (March 26, 1890).

⁵ *East End R. R. Co. v. Doyle*, 13 S.

W. Rep. 936, 88 Tenn. 747, 17 Am. St. Rep. 933 (1890).

⁶ *McQuaid v. Portland & V. R. R. Co.*, 18 Oreg. 237, 22 Pac. Rep. 899, 1 Am. R. R. Corp. Rep. 34. See also in regard to steam dummies, *Railroad Co. v. Bingham*, 87 Tenn. 522, 11 S. W. Rep. 705; *Smith v. Railroad Co.*, 87 Tenn. 626, 11 S. W. Rep. 709; *Far-*

steam dummy, it was held that the question whether the owner of the abutting land was entitled to damages for the operation of a railway in the streets depended on whether his right of access, and other rights appurtenant to his property, were interfered with, and that this was a question of fact for the jury. The court said the question who owns the fee was of little consequence, because the fee could not be in any real sense in the public, but is held for the purposes of a street; and if the fee is in the individual, he holds it subject to the public use of the street.

§ 122. In a later case in Michigan¹ it was held that a railroad operated by a steam dummy running along a country road did affect the rights of the owner of the adjoining land, not because of the kind of motor used, but because the line was so constructed with cuts and fills as not to make a part of the highway. The court said: "A street railway the rails of which are laid to conform to the grade and surface of the street, and which is otherwise so constructed that the public are not excluded from the use of any part of the street as a public way, carrying passengers, stopping at street crossings to receive and discharge them, is a street railway, whether it be operated by horses or electric power or by steam motor such as shown to be used by the defendant in this case." An injunction, however, was granted against the maintenance of the road in question until compensation should be made.

§ 123. Use of the cable railway.—The use of the cable as the motive power involves the digging up of the soil, and placing a permanent structure along the middle of the street, and so there may perhaps be some likeness in this respect to the planting of poles along the street. The slot or groove for the cable is not an obstruction, but it is not quite safe for horses to travel upon, and it does, therefore, interfere with the use of the tracks for one-horse vehicles, and it certainly does take pos-

num v. Concord Horse Ry. Co. (N. H.), 29 Atl. Rep. 541, where plaintiff did not own the fee, and it was held that his damages were confined to injury to easement of access, etc.; Hussner v. Brooklyn City R. Co., 114 N. Y. 433, 21 N. E. Rep. 1002, an action for

damages from noise and smoke in using a steam motor. For a discussion of the question of nuisance, see 36 Am. & Eng. R. Cas. 372, 5 L. R. A. 371, note.

¹Nichols v. Ann Arbor & Ypsilanti R. R. Co., 87 Mich. 361 (1891).

session of a greater portion of the land within the street than that which is occupied by the poles of the electric railway.

The question of the occupation of the soil of the street has not been mentioned in the cases, but the cable has been considered rather as a change of motive power, and with reference to the statute under which the franchise was granted. In a case in the New York court of appeals, in which one of the conditions of the grant was that no steam should be used, the court held that the franchise did not include the right to excavate and use the streets for a cable.¹ In a later case in the same court, it was held that a change from horse power to the cable may be made without the consent of the owners of the land.² The change was made before the amendment to the constitution of New York requiring the consent of the owners of one-half the property along the line to the construction and operation of a street railway, and the court distinguished the decision in *People v. Gilroy*, relating to an electric road, in which this point was not taken.³

In a local court in Ohio⁴ it has been held that a street railway operated by cable is not to be classed with steam railways, and is not a new burden entitling the owner of the land to compensation.

And again, in the United States circuit court for the northern district of Illinois, it was held that a land-owner who did not own the fee was not entitled to an injunction against the use of a street for a cable railway without his consent, in the absence of proof of some special injury to himself, beyond what he might suffer in common with the public at large.⁵

§ 124. Poles and wires for the electric railway — Do they affect the property rights of the abutting owner? —The use of the overhead system of electric wires presents some differ-

¹ *People v. Newton*, 112 N. Y. 396 (1889), 3 L. R. A. 174.

² *In re Third Avenue R. R. Co.*, 121 N. Y. 336 (1890).

³ 9 N. Y. Supp. 686, 833 (1890).

⁴ *Harrison v. Mt. Auburn Cable R. Co.*, 17 Wkly. Bull. 265 (Hamilton Com. Pleas, Ohio).

⁵ *Lorie v. North Chicago City R. R. Co.*, 32 Fed. Rep. 270. See also, with

reference to the cable as a motive power, *Indianapolis Cable St. R. R. Co. v. Citizens' St. R. R. Co.*, 127 Ind. 369, 8 L. R. A. 539, 24 N. E. Rep. 1054, 43 Am. & Eng. R. R. Cas. 234; *Des Moines St. R. R. Co. v. Des Moines Broad Gauge R. R. Co.*, 74 Iowa, 585; *Teachout v. Des Moines B. G. R. R. Co.*, 75 Iowa, 732.

ent questions from the use of steam motors or cables. It involves some obstruction of the streets by the poles and wires, and is said to interfere with the working of the telephone. The poles must be set up either along the sidewalk or in the middle of the street, and the wires must be strung along, and in some places across, the street. It is strenuously objected that the placing of the poles in the soil of the street is a taking of private property, and that even if the fee of the street is in the city it is an interference with the easement of the abutting owner and his right of access. It must be borne in mind that the question is not whether the poles interfere with public travel, and thus constitute a public nuisance. This is a question to be decided by the legislature. If the legislature decides that the interests of public travel are subserved by having the poles in the streets, then the public have no ground for complaint. The only question now is whether the private rights of the abutter are affected; whether it is a private nuisance to him, and whether his lands are taken or his rights on the street infringed. In deciding this question, it is to be remembered that the land used is a public street, and that, whether the fee is in the abutting owner or in the public, the whole beneficial use of the land is in the public for the purposes of a street. For those purposes it belongs wholly to the public; and so long as it is used for those purposes it does not belong to the individual at all.¹

§ 125. Comparison with the elevated railroad cases—Poles affect not the land, but only rights of adjacency, unless the use is a perversion of the use of the street.—The abutter retains only his easements of light and air and access, and these are property rights; and for the loss of these, it has been decided in the New York elevated railroad cases, he is entitled to compensation.² It was held in these cases that

¹Hoboken Land & Impr. Co. v. Manhattan R. R. Co., 31 N. Y. St. Rep. 134; Abendroth v. Manhattan R. R. Co., 122 N. Y. 1; Haynes v. Depue, J.

²Story v. N. Y. Elev. R. R. Co., 90 N. Y. 122; Lahr v. Met. Elev. R. R. Co., 104 N. Y. 268; Pond v. Met. Elev. R. R. Co., 112 N. Y. 186; Porter v. Met. Elev. R. R. Co., 120 N. Y. 284; Hochalter v. Manhattan R. R. Co., 31 N. Y. St. Rep. 113; Giordano v. Manhattan R. R. Co., 31 N. Y. St. Rep. 134; Abendroth v. Manhattan R. R. Co., 122 N. Y. 1; Haynes v. Thomas, 7 Ind. 38; Crawford v. Delaware, 7 Ohio St. 459; Stack v. East St. Louis, 85 Ill. 377, and many other cases. See also an article on the Elevated Road Litigation, by Edward A. Hibbard, 4 Harv. Law Review, 70.

although the erection of a heavy iron railway upon posts in the streets was not a taking of the land, yet it did in fact affect the use of his land in connection with the street, and was an interference with the right of access and of light and air, which entitled the adjacent owner to compensation.¹ So, also, the court of appeals of Maryland, in a later case,² while they held that the erection of abutments for an elevated railroad in a street was not taking of the property of abutting owners for which compensation must first be made, yet declared that the land-owner had a remedy at law for the injury to his right of light and air and access.

It would seem to follow from this that if the use of cars for local travel, propelled by electricity, is a proper use of the street as such, then the occupation of the soil for poles reasonably necessary to supply the electricity is not a taking of land belonging to the abutting owner, and that it does not interfere with his rights in the street, unless it appears that it affects his beneficial use of it as a street in connection with his land, and that it does in fact affect his access to his premises, or obstruct the light or air.

It becomes, therefore, a question of fact whether the electric railroad is a mode of using the street for the purposes for which it was designed, and whether the poles and wires really and

¹ *Story v. N. Y. Elev. R. R. Co.*, 90 N. Y. 122; *Lahr v. Met. Elev. R. R. Co.*, 104 N. Y. 268; *Pond v. Met. Elev. R. R. Co.*, 112 N. Y. 186; *Porter v. Met. Elev. R. R. Co.*, 120 N. Y. 284; *Abendroth v. Manhattan R. R. Co.*, 122 N. Y. 1. But where it appeared that the value of the property had been actually enhanced and no damages were shown, an injunction was refused. *O'Reilly v. N. Y. El. Ry. Co.* (N. Y. App.), 42 N. E. Rep. 1063.

In *Fobes v. Rome, W. & O. R. R. Co.*, 121 N. Y. 505, it was held by the court of appeals that the abutting owner, not owning the fee in the street, has no right to compensation for the use of the street by a steam railroad duly authorized; but the same court, in *Abendroth v. Met.*

Elev. R. R. Co., 122 N. Y. 1-17, said that the former case did not decide that an abutting owner has not vested rights to light, air and access in a public street which are incident to his lot, and are private property, but that the operation of a steam railroad on the grade of the street was not an invasion of his rights.

² *Garrett v. Lake Roland El. Ry. Co.*, 79 Md. 277, 29 Atl. Rep. 830 (1894). This case differs from the New York elevated railroad cases in that in the latter injunctions were granted and in the former they were disallowed. In the former the structure was regarded as a diversion of the street from its proper uses because of its effect.

substantially affect the use of the adjacent land and interfere with the right of access and light and air.

§ 126. **There is no change of use in substituting electricity for horse power.**—It would seem to be very clear that the use of electricity instead of horses to propel street cars used for the same purposes as horse cars does not change the use of the streets. The cars are of the same kind; they are used in the same way for taking people from door to door, and facilitating travel in and about the city. The use of the road corresponds exactly with the description of a horse railway in the New Jersey cases cited in section 120, as distinguished from a steam railway, which occupies the streets for another purpose, to the exclusion of local travel.¹

§ 127. **Question of interference with use of street is a question of fact.**—The question whether the poles and wires interfere with the use of the street as such in connection with the adjacent land is a question of fact to be determined in each case, but it cannot be said without proof that the poles and wires as ordinarily arranged would have that effect. The most serious opposition is made to those placed in the middle of the street; but however inconvenient these may be to the public, it is clear that they are less open to objection from the land-owner than those on the sidewalk, in which, by custom at least, the land-owner has more privileges, and on which he is allowed to place obstructions, such as awning posts and hitching posts, for his own convenience. The land itself occupied by the electric poles in the middle of the street belongs to the public for the uses of the street, and if the pole is put there for such a use, nothing belonging to the abutting owner is actually taken. Such seems to me to be the conclusion to be reached upon legal principle, and such was the conclusion of Vice-Chancellor Van Fleet in *Halsey v. Rapid Transit Ry. Co.*, above referred to.²

The real question is not whether the poles and wires trespass

¹See, however, *State, Green pros. v. Trenton*, 25 N. J. L. 92, 15 N. J. Law Jour. 39, 45, where the electric railway is declared not to answer the description of the horse railway given in those cases. The same court afterwards decided that in the mode of use of the streets the electric cars are

substantially like the horse cars. *Jersey City v. Kennelly*, 57 N. J. L. 293, 30 Atl. Rep. 531 (1894).

²*Halsey v. Rapid Transit St. Ry. Co.*, 47 N. J. Eq. 380, 20 Atl. Rep. 559, 46 Am. & Eng. R. R. Cas. 76 (1890); ch. VIII, § 98, *supra*.

upon what may be technically the land of the abutting owner, but whether the use of them and of the electric cars does, in fact, interfere with the free and convenient use of the street in connection with the land, or diminish the value of the land by changing its relation to the street.

The land-owner has no absolute veto upon the planting of the poles by reason of his technical ownership of the soil, but his right to compensation will depend upon whether the poles are so constructed or so placed as to affect his free access to every part of his property, and whether the cars are so run as to be inconsistent with a free and safe use of the street from and to his land for other street uses. It may depend somewhat on the character of the street, the purposes for which it is used, and that which gives the property along the line of it its peculiar value.

§ 128. Cases — *Mt. Adams & Eden Park Inclined Railway Co. v. Winslow*.—I shall now refer to the cases. Many of them are decisions of local and inferior courts, but some of these bear evidences of careful examination of the principles and authorities, and they are all interesting as the beginnings of the application of the principles to new conditions.¹

One of the earliest cases was *Mt. Adams & Eden Park Inclined Railway Co. v. Howard Winslow et al.*, in the court of common pleas of Hamilton county, Ohio, in the year 1888.² In that case it appeared that poles were placed along the margin of the sidewalk about one hundred feet apart, and wires were stretched across and along the street for the purpose of supplying electricity to street cars. An injunction was granted to prevent the defendant, a land-owner, from removing the poles. Maxwell, J. dissolved the injunction and issued a mandatory order to remove the poles. He referred to cases in Ohio establishing the doctrine that the right of the adjoining owner to ingress and egress, and light and air, is just as much his property as the ground on which his building stands, and cannot be taken from him without compensation, and that he

¹ Several of these cases are not reported, and some others are not generally accessible. I am indebted to New York, for copies of the cases and opinions.

Mr. John S. Wise, counsel for the Edison General Electric Company in ²20 Week. Bull. & O. L. J. 420 (Nov. 17, 1888).

will not be left to his remedy at law. He said it was not enough to say that these poles are in aid of public travel, and that every vehicle is an obstruction of the street. There is an essential difference between a fixed obstruction and a moving one. One is exercising the easement of passage and the other is interfering with it. There is no distinction between the poles for the electric railway and telegraph poles, and neither one nor the other can be set up without the consent of the land-owner.

On appeal to the circuit court this decision was reversed.¹ The court held that the sidewalk was a part of the highway, and to be dealt with as such; that the margins of sidewalks have for centuries been appropriated for placing shade trees, lamp posts, hitching posts, and similar structures, and that these new poles did not, in fact, obstruct the access to the plaintiff's land and imposed no new burden upon it; that the electric current used was not dangerous; that the use of the street by the electric cars was substantially the same as that by horse cars, the mode of travel being the same, the only change being in the motive power. The poles were allowed to stand.

§ 129. *Pelton v. East Cleveland R. R. Co.*—This decision was quoted and approved by the court of common pleas for Cuyahoga county, Ohio, in *Pelton v. East Cleveland R. R. Co.*, January, 1889.² The court said that the question of speed and of danger to travelers on the street might safely be left to the municipal authorities, and that although the poles added nothing to the beauty of the street, yet the burden or obstruction created was more fanciful than real, and that it could not be said in seriousness that the poles and wires would, if properly placed, obstruct the light and air, or interfere with the ingress and egress to and from the plaintiff's land. An injunction was refused. This case came before the circuit court of the same county on appeal, and upon a supplemental petition alleging that the running of the cars made a great deal of noise and danger, that the electric current was dangerous and not under control, and that the whole system was a public nuisance and should be abated. The court held that the noise and speed were matters for the common council to regulate, and that the

¹3 Ohio Circuit Court Rep. 425.

²22 Week. Bull. & O. L. J. 67.

weight of evidence was that the current used was not very dangerous. The injunction was refused.

§ 130. *Taggart v. Newport St. Ry. Co.*—The first decision by the supreme court of a state seems to be that in *Taggart v. Newport St. Ry. Co.*, already referred to.¹ This was decided January 25, 1890, and the opinion was read by Chief Justice Durfee. A bill was filed by owners of abutting land to restrain a street railroad company from erecting poles and wires in front of their houses for the purpose of carrying an electric current to propel the street cars. The poles were to be placed one hundred and twenty feet apart, and along the margin of the sidewalks. The act of incorporation of the company provided that the road might be operated "with steam, horse or other power, as the councils of the city might from time to time direct." The permission of the council to use the overhead electric system had been given by ordinance. The court held that the right to use electricity might be inferred from the words of the charter, and that this was probably meant by the words "other power" in an act passed in the year 1885; that the poles did not incumber the streets, within the meaning of a clause in the charter forbidding the incumbrance of any portion of the street not occupied by the tracks; and lastly, that street railways operated by electricity by means of poles and wires do not constitute an additional servitude upon the land. The court said it was well settled that an ordinary steam railroad does impose a new servitude, and that a horse railroad does not; that, although the distinction is often stated as a distinction between steam and horse railroads, it properly rests, not on any difference in motive power, but on the different effects produced by them respectively on the highways and streets which they occupy. It is not the motor, but the kind of occupation, whether practically exclusive or not, which is the criterion. A steam railroad comes into serious conflict with the usual modes of travel, whereas an ordinary street railway, instead of adding a new servitude, operates in furtherance of the original uses of the street. The danger from the elec-

¹ 16 R. I. 668, 19 Atl. Rep. 326, 7 L. Eng. R. R. Cas. 208, 3 Am. El. Cas. R. A. 205, with note, 2 Am. R. R. & 306.
Corp. Rep. 44, with note, 43 Am. &

tric current, or from the frightening of horses, does not appear to be sufficient to creat a new servitude.

In answer to the suggestion that telegraph and telephone poles and wires have been held to constitute a new servitude, the court said that these are not used to facilitate the use of the street for travel and transportation, or if so, very indirectly so, "whereas the poles and wires now in question are directly ancillary to the uses of the street as such, in that they communicate the power by which the street cars are propelled;" and the chief justice alluded to the significant fact that telegraph lines erected by a railroad company within its right of way to increase the safety and efficiency of the railroad were held not to be a new burden, but only a legitimate development of the easement already acquired.¹ The injunction was refused.

§ 131. *Detroit City Railway Co. v. Mills.*—After this came several more decisions of inferior courts. There is one by Judge Reilly, of the circuit court of Wayne county, Michigan, which was afterwards affirmed by the supreme court.² Referring to Judge Cooley's opinion in a case in Michigan³ that a street railway was a proper use of a city street, although a steam railroad was not, he held that a street railway operated by electricity imposed no new servitude. The poles, he said, being placed along the margin of the street, where other posts are put, do not interfere with travel. The cars, he admitted, frightened horses (they had frightened his own), but the horses would get accustomed to them, and the wires were only dangerous in case of accident. He granted an injunction against cutting down the poles.

§ 132. *Loneragan v. Lafayette St. Railway Co.*—In *Loneragan v. Lafayette St. Railway Co.*,⁴ already referred to, it was held that the purpose of the street railway, whether it was operated by electricity or by horses, remained the same; that it was well settled that horse railroads are a proper use of the street, and do not impose a new servitude upon the land, and

¹ See chapter XII on Telegraphs J. 104, 3 Am. EL Cas. 333. See *infra*, § 26, ch. X.
on Post-roads.

² *Detroit City R. R. Co. v. Mills*, Circuit Court of Wayne Co., Mich., 1890; affirmed May 6, 1891, 85 Mich. 634, 48 N. W. Rep. 1007, 10 R. R. Corp. L.

³ *Grand Rapids, etc. R. R. Co. v. Heisel*, 47 Mich. 393.

⁴ Circuit Court at Lafayette, Indiana, July 9, 1899; *supra*, ch. II, § 35.

that there was not, in the mode of operation of the electric road, sufficient in the way of noise or danger to make such a substantial or permanent impairment of the use of the street by the general public as to lead to the inference that an additional burden has been imposed upon the land.

§ 133. **Louisville Bagging Manufacturing Co. v. Central Pass. Railway Co.**—The subject was discussed in all its aspects in a long opinion by Judge Toney, of the Louisville law and equity court, on June 30, 1890.¹ He referred to the authorities by which it has been held that a horse railroad is not a new servitude, and, quoting the opinion of the Rhode Island case, said that he was satisfied that the conversion of the horse cars into electric cars, and the construction of poles and appliances necessary for the operation of the cars by electricity, did not constitute a new servitude entitling the plaintiff to compensation. Examining the question of danger to the plaintiff's servants and property from the overhanging wires and from running the cars by electricity, the judge discoursed eloquently on the mysteries of electricity, and after examining, he says, the evidence in the case, and all the accessible literature on the subject, he decided that the single trolley wire system had proved to be safe and that there was no ground for an injunction. This decision was affirmed by the court of appeals in 1893.² The court said the system of overhead trolley wires seemed to be as yet the only one in practical use, and, although new and not fully perfected, the system was not much, if any, more dangerous than horse power, and the cars, although they ran at a greater speed than horse cars, were more easily controlled and did not really more obstruct the street or interfere unreasonably with the business therein, and it was held that in view of these facts the court ought not to enjoin or limit their use. It is to be observed, however, that the court said it was "well settled that the use of a public street for travel and transportation by means of railway cars falls within the purposes for which streets are established and dedicated; and it is only when other ways of travel and transportation are prevented

¹ Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co., Louisville Law and Equity Court, Louisville, Ky., June 30, 1890, 3 Am. El. Cas. 236.

² Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co., 95 Ky. 50, 23 S. W. Rep. 592, 3 Am. El. Cas. 202.

or unreasonably obstructed that courts can interfere to either enjoin or limit operation of railroads upon a public street."

§ 134. *Halsey v. Rapid Transit St. Ry. Co.*—A well-considered decision is that of Vice-Chancellor Van Fleet, of New Jersey, from which we have quoted already. The case is *Halsey v. Rapid Transit St. Ry. Co.*, decided in the court of chancery, December 6, 1890.¹ The company was organized under a general law, passed in 1886, "to provide for the incorporation of street railways and to regulate the same." Nothing is said in the act about the kind of motive power to be used. This general grant was of itself sufficient, the court said, to include electric power, and the decision on this point has been quoted already. There was, however, other legislation; a statute had been passed authorizing any street railroad to use electric motors, with the consent of the city. Such consent had been given by resolution specifying the overhead system, and providing for poles either on the sides or in the middle of the street, every other pole in the middle of the street to be furnished with a group of incandescent lights. The railroad company was about to put up poles one hundred and twenty-five feet apart, in the middle of the street, in front of the complainant's tannery. The bill was filed for an injunction, and it was insisted that the resolution of the common council went beyond the statute in authorizing the use of poles; that the poles occupied land belonging to the complainant and interfered with his easements in the street; for all of which he was entitled to compensation, and that this not being provided for, the acts of the company were unlawful.

The vice-chancellor held that the overhead system was included in the legislative grant; that the testimony of Thomas A. Edison and other witnesses showed that this was the best electrical system, and the only one which as yet had proved successful, and that the poles and wires were, in the present state of the art, necessary to the successful operation of the defendant's railway by electricity.

"They form part," he said, "of the means by which a new power, to be used in the place of animal power, is to be sup-

¹ 47 N. J. Eq. 380, 20 Atl. Rep. 859, 46 Am. & Eng. R. R. Cas. 76, with note, 3 Am. El. Cas. 283.

plied for the propulsion of street cars, and they have been placed in the street to facilitate its use as a public way, and thus add to its utility and convenience. . . . The whole matter may be summed up in a single sentence: the poles and wires have been placed in the street to aid the public in exercising their right of free passage over the street. That being so, it seems to me to be clear beyond question that the poles and wires do not impose a new burden upon the land, but must, on the contrary, be regarded both in law and reason as legitimate accessories to the use of the land for the very purposes for which it was acquired. They are to be used for the propulsion of street cars, and the right of the public to use the streets by means of street cars, without making compensation to the owners of the naked fee in the street, is now so thoroughly settled as to be no longer open to debate. It would seem, then, to be entirely certain that the occupation of the street by poles and wires takes nothing from the complainant which the law reserved to the original proprietor when the public easement was acquired."

The vice-chancellor cited with approval the cases above referred to in Rhode Island, Kentucky, Ohio and Indiana, and said the question whether there was a new burden must be determined by the use which the new method makes of the street, and not the motive power which it employs in such use. And this principle, he said, "exhibits in a very clear light the reason why it has been held that telegraph and telephone poles do impose a new burden, since they are placed in the street, not to aid the public in their right of free passage, but in the transmission of intelligence; and although streets are used for this purpose in carrying the mails, yet this mode differs so essentially from their general and ordinary use that the general current of authority, with an exception in Massachusetts, has declared that it does not come within the public easement."

The vice-chancellor added that the poles in the present case served an ordinary public purpose in lighting the streets, and also that, with respect to danger from the current, the proofs showed that the current employed might be used with entire safety to everybody. In answer to the contention that the poles ought not to be placed in the middle of the street the court said that this part of the street was especially sub-

ject to public control, and that the complainant had fewer privileges with respect to it than in the sidewalk; and that the poles were placed in a part of the street of which, so long as it was used as a street, the complainant, by virtue of his title to the fee, could not make any use whatever.

§ 135. **Halsey v. Newark.**—An application was made to the supreme court of New Jersey, before this decision was rendered, for writs of *certiorari* to review the resolution of the common council of Newark, giving permission to the Rapid Transit Street Ry. Co. and the Newark Passenger Ry. Co. to set up poles and wires for the electric current, and to also review an ordinance of the common council of Trenton, giving a similar privilege to the Trenton Horse Railroad Co. to use the streets of Trenton. The court allowed the writ, and testimony was taken to show whether at the time of the passage of the act of March 6, 1886, electric motors implied the use of poles and wires. The cases were decided January 8, 1892,¹ and the court, while expressly saying that it did not rest its decision upon the rights of the abutting owners, held that the poles and wires were an obstruction of the street which was not authorized by the statute giving permission to use electric motors. They said the city council had no power without distinct legislative authority to permit the obstruction of the streets, even though the obstruction was incidental to the use of a street railway. Referring to the evidence, they said it appeared that cars operated by storage batteries had been in operation for five years at the time of the passage of the act, and that, therefore, the act did not imply the right to use poles and wires. They said the electric railway with respect to its obstruction of the street was rather to be compared with the steam railroad than the horse railroad, and that the planting of poles was not an ordinary or proper use of the street, but that an abutting land-owner had a right to complain if a pole was put on any part of his land, even in the middle of the street, and was entitled to a writ of *certiorari* to have the resolution or ordinance set aside. The court did

¹State, Halsey pros., v. Newark, 54 N. J. L. 102, 23 Atl. Rep. 281, 15 N. J. L. J. 39; State, Green pros., v. Trenton, 54 N. J. L. 92, 23 Atl. Rep. 284, 15 N. J. L. Journ. 45, with a note giving a summary of the evidence on the subject of the prior use of the storage battery and the trolley system and referring to cases.

not allude to the decision of Vice-Chancellor Van Fleet, nor to any of the other cases on electric railroads referred to in this chapter.¹

Although the question of a new burden upon the lands was expressly reserved, it seemed as if the supreme court regarded the erection of the poles as a perversion of the proper uses of the streets, and so disallowed the premises of the vice-chancellor's argument.²

Less than three years later, however, the court had the question directly before it, and expressly affirmed the conclusions of the vice-chancellor.³ An extract from the opinion in this case will be given in a later section,⁴ and the cases in which this was a matter of first impression must be stated in their order.

§ 136. *Lockhart v. Craig St. Ry. Co.*—The opinion of Vice-Chancellor Van Fleet was confirmed by a decision of the supreme court of Pennsylvania rendered at about the same time, and without reference to his decision. The case was *Lockhart v. Craig St. Ry. Co.*⁵ The opinion of Stone, J., in the court below was affirmed by the supreme court. The poles and wires were to be placed along the line of the curbstone. As to the wires, the judge said:

"The placing of the wires over the streets does not appear to be a taking of plaintiff's property. The streets are dedicated to the public use, and he has certain special rights as an abutting owner; but I cannot see how a wire run through the air above the streets can be said to be a taking, injury, or a destroying of his property."

As to the posts, he said that in Pennsylvania it had been generally understood that the land-owner had a fee to the middle of the adjoining street, and that the public had only a right of passage over it;⁶ but this must not be taken in a literal sense,

¹ For a further statement of this case and of the evidence relating to the use of the storage battery and the trolley system in March, 1886, see ch. II, § 22 (p. 25), *supra*.

² See § 134.

³ *State, Kennelly v. Jersey City* (November 8, 1894), 57 N. J. L. 293, 30 Atl. Rep. 531, 5 Am. El. Cas. 146, 26 L. R. A. 281.

⁴ Sec. 142, p. 173, *infra*.

⁵ 8 Phila. County Court Rep. 470, 37 Pittsburg Law Journ. 479, 21 Atl. Rep. 26 (Jan. 6, 1891), 139 Pa. St. 419.

⁶ *Chambers v. Ferry*, 1 Yeates, 167; *Lewis v. Jones*, 1 Pa. St. 336; *Commonwealth v. Westchester*, 9 Pa. Co. Ct. Rep. 542, April 27, 1891.

especially in towns and cities, and he referred to the common use of the streets for gas pipes, water pipes, awning posts, fire plugs and lamp posts, all of which he said "more or less impinge upon the absolute right of an owner of the soil, and are not necessary to accommodate public travel, or even consistent with the public right to an unobstructed passage-way." He referred to *Taggart v. Newport St. Ry. Co.* as a case directly in point, and said:

"My own impression is that the use of poles, wires and other necessary appliances, such as proposed being used by defendants, is not, in any respect, a greater interference with the ownership of the adjoining property owner on a street than the use of streets for fire plugs, horse troughs and lamp posts, which have long and generally been recognized as within the power and control of the city government. Recognizing the right of the legislature and city authorities to authorize the building of railways upon streets of a city without compensation to property owners, because it is a means of public transportation and accommodation, the necessary and proper apparatus for moving them must be allowed to follow as an incident, unless there is something illegal in its construction or use." An injunction was refused.

This decision has been approved and followed in later cases in Pennsylvania.

§ 137. **Saginaw Union Street Railway cases.**—There are two cases in Michigan, decided in November, 1890, in which relief against the electric railway was denied the land-owner, but which, nevertheless, suggest that he may have legal ground for complaint. They were both suits against the Saginaw Union Street Railway Co.¹ In one it was held that an injunction against the use of electricity on a street railway would not be granted to an owner of vacant land on the ground that when he built a house there the operation of the line by elec-

¹ *Potter v. Saginaw Union St. R. R. Co.*, 83 Mich. 235, 10 L. R. A. 176, 9 R. R. & Corp. L. J. 34, 47 N. W. Rep. 217; *Barber v. Saginaw Union St. R. R. Co.*, 83 Mich. 299, 47 N. W. Rep. 219.

In *Electric R. R. Co. v. Grand Rapids*, 84 Mich. 257, it was held that

when a common council had given a street railway company permission to operate its line by electricity, the kind and pattern of poles to be approved by the council, it cannot insist upon the furnishing of transfer tickets as a condition of permission to use a certain kind of pole.

tricity would be annoying and dangerous. Nothing was said about poles, but it was held that mere apprehension of future injury was not sufficient, especially in a case in which large sums of money have already been spent by defendant in constructing their electric apparatus. In the other case, it appeared that the track was wholly on the further side of the street, and that the defendant had removed all poles and wires from in front of the premises of the plaintiff; and it was held that the plaintiff was entitled to no relief except a perpetual injunction against erecting poles and wires in front of his premises (and on his side of the street) without his consent. The subject was not discussed, but it would seem that the court thought that the setting up of poles in the plaintiff's land in the street was an invasion of his rights.

§ 138. **Detroit City Ry. Co. v. Mills on appeal.**—These decisions were followed, however, by another at the same term relating to the same kind of electrical apparatus.¹ The complainant was a street railway company having lines in the city of Detroit, and was authorized by the common council to extend its lines through Mack street, and to substitute in lieu of animal power such system of electric or other motive power, except steam, as should seem best, upon any and all of its lines. Poles were put up along both sides of Mack street in front of the defendant's lands, and he cut them down and threatened to continue to do so as often as they were put up. On a bill filed for injunction against this, and on a cross-bill praying a perpetual injunction against the use of the railway, it was held that in the absence of injury to his right of ingress and egress, and to his right of free passage over the street, the abutting land-owner had no cause to complain of poles set up for the purpose of propelling street cars for public travel.

There was a difference of opinion between the judges. Three concurred in the decision and two dissented. Grant, J., with whom Long, J., concurred, maintained emphatically that however it might be with country highways, it was well settled that the streets of a city might be used for any purpose which was a necessary public one, and that for any such use the abutting land-owner would not be entitled to a new compensation

¹Detroit City R. R. v. Mills, 85 Mich. 634, 48 N. W. Rep. 1007, 10 R. R. & Corp. L. J. 104 (May 8, 1891).

whether he owned the fee in the street or not. He referred to the cases in which it had been held that horse railroads are not a new burden upon the land, and said the electric railway was only an improved method of making the same use of the streets.

"The poles," he said, "are a necessary part of the system. When they do not interfere with the owner's access to and use of his land, we see no reason why they should be held to constitute an additional servitude."

Champlin, C. J., while concurring in the decision, said he was not prepared to say that a street railroad track was in itself no additional burden; that he thought it was, but to what extent would depend upon all the circumstances of the case. If in any case it becomes a nuisance and causes damage, the abutting owner has his remedy at law. And so with regard to the setting of poles to aid the propulsion of cars by electricity, he said: "I do not think ordinarily it is such a taking of private property as requires condemnation and compensation before the poles can be set; but I think that if the owner suffers damage on account of the erection of poles, he should seek his remedy at law for such damage." McGrath and Morse, JJ., dissented; McGrath, J., insisted most earnestly that a street railway, whether operated by animal power, electricity or steam, was an additional burden. "Any fixed right of way in a street," he said, "is a burden upon that street. Any use of a street, a like use of which is not common to all, is a new servitude. Any use of a street which narrows the street, or which interferes with the use of any part of the street by the public, or confines the public to a use of but a part of the street, is an added burden." And he made a strong argument to show that no railroad ought to be allowed to be operated in a street without making compensation to the land-owner for the damage actually sustained by reason of the change in the use of the street.

Morse, J., concurred in this opinion, and insisted also that the operation of a street railway, and especially an electric railway, interfered with the access to property and with ordinary travel, and was injurious to the property and disagreeable to the owners, and that public convenience was not a good reason for inflicting injury upon individuals without compensation.

It is to be observed that these dissenting opinions make no distinction between the electric railway and the horse railway.

The former may be a little worse, but both are on principle a perversion of the purpose of the street and a damage to the land-owner. That is not a question we need attempt to discuss. We have to do only with use of the poles and wires, and there is no reason given in these dissenting opinions why the electric system may not be used if it is determined that a horse railway is a proper use of the street.¹ In a later case in Michigan relating to a railroad operated by a dummy steam engine the decision in the Mills case was approved, and the court said the answer to the question whether the land-owner was entitled to compensation or not depended on the mode of use of the street rather than on the motive power employed.²

§ 139. The same — Later cases — Maryland.— In the first edition of this book, when the subject was new, it was important to describe in some detail all the cases that had then appeared, and it seems best now to let this account remain substantially as it was then written, but the later cases have been numerous, and they have generally followed the tendency of the earlier decisions, and it will not be necessary to examine many of them in detail. The early decisions in Rhode Island, New Jersey, Pennsylvania and Michigan have been the leading cases, and the principles suggested in them have been adopted and followed to their proper conclusions.

¹ In *Tracy v. Troy & Lansingburgh R. R. Co.*, 54 Hun. 550, it was held that an injunction against the use of poles should be vacated where it appeared that the plaintiff had no further inducement to press his suit, and that the effect of the injunction would be to retard a work of public utility.

In *re Rochester Electric R. R. Co.*, 33 N. Y. St. Rep. 695, 25 N. E. Rep. 381, it was held that where the constitution requires consent of one-half the property owners, before proceedings are taken to condemn land for a street railway, this consent is a prerequisite to proceedings to condemn private property for an electric railway. See also *People v. Gilroy*, 9 N. Y. Supp. 686, 833; In *re Third Ave. R. R. Co.*, 24 N. E. Rep. 951 (N. Y.).

In the former case (*Gilroy's*), the

consent of the owners of one-half the property being required by the constitution for the construction of a street railway, it was held that an electric railway could not be built without it; but in the *Third Avenue Railroad* case, where it appeared that the charter of a horse railroad was granted before the constitutional provision was adopted, it was held that the consent was not required for a change to the cable system.

² *Nichols v. Ann Arbor & Y. St. R. R. Co.*, 87 Mich. 361, 49 N. W. Rep. 538. See ch. X, § 122.

This decision has been approved and followed in later cases in Michigan. *People v. Ft. Wayne, etc.*, 52 N. W. Rep. 1010; *Dean v. Ann Arbor, etc.*, 53 N. W. Rep. 396.

The court of appeals of Maryland, in January, 1892, referring to some of these decisions, said the question had been fully considered by the highest courts of other states, and these courts, without a single exception, had held the use of electricity for propelling street-cars to be a legitimate use of the street for that purpose, and that the decisions proceed upon the principle that it is but a new motive power, in no manner inconsistent with the uses and purposes for which streets were opened and dedicated as ways for public travel.¹ This decision was approved and followed by the same court in 1894, and it was held that an electric railway might be built and operated on a turnpike, without compensation to the abutting owners, although when the land was taken it was not contemplated that any railway was to be laid upon the road. The court said, however, that the company must remember that it has no exclusive right to the highway, and must respect the rights of others equally entitled to its use.²

§ 140. **Later cases — Pennsylvania.**—There were several decisions in Pennsylvania to the same effect during the year 1892. In *Buffalo, etc. Ry. Co. v. Du Bois Pass. Ry. Co.* the supreme court affirmed the decision of the common pleas in which the court followed the Taggart and Lockhart cases, and said that, if the application of electricity to the hauling of street cars did not materially interfere with the use of the street by the public for other proper purposes, it did not impose a new servitude or affect the rights of the abutting owner.³ So also in *Fox v. Catharine & Bainbridge Streets Ry. Co.*⁴ the Philadelphia common pleas, following the Lockhart case, refused an injunction at the suit of an abutting land-owner against the construction of the overhead trolley system in the street. In *Watkin v. West Phila. Pass. Ry.*⁵ it was conceded that a company organized before electric power was known could, under its old charter, adopt and use electricity; but an injunction was allowed because the necessary municipal consent had

¹ Koch v. North Ave. Ry. Co., 75 Md. 222, 4 Am. El. Cas. 153.

³ 149 Pa. St. 1, 24 Atl. Rep. 179, 4 Am. El. Cas. 217 (1892).

² Green v. City & Suburban Ry. Co., 78 Md. 294, 28 Atl. Rep. 626, 4 Am. El. Cas. 206. See also Poole v. Falls

⁴ 12 Pa. Co. Ct. Rep. 180, 4 Am. El. Cas. 158 (1892).

Elect. Ry. Co. (Md.), 41 Atl. Rep. 1069 (1893).

⁵ 1 Pa. Dist. Ct. Rep. 463 (June 25, 1892).

not been obtained. In *Gillett v. Chester & Media Ry. Co.*¹ the Delaware common pleas said, with some reluctance, that the question was no longer an open one, but had been decided by the supreme court in favor of the company, and the earlier cases quoted in this chapter were cited and approved by the court of common pleas of Luzerne county, on February 8, 1892;² but in a later case in the supreme court³ an injunction was granted to an abutting owner against the construction of an electric railway without lawful authority, on the ground that, being unauthorized, it was a nuisance, which he, having a special interest in the street, had a right to ask the court of equity to enjoin.⁴

It seems to be now well settled, however, in Pennsylvania that the operation of a street railway on a public street, whether by horses, cable or electricity, when authorized by law, imposes no additional servitude upon the land which will entitle the owner to compensation.⁵

These cases referred to electric railways on city streets, but on January 4, 1892, the supreme court declined to pass on the question of the effect of an electric railway upon a rural highway, but dissolved a preliminary injunction so that the case might go to final hearing; and afterwards in 1895 the supreme court decided that under the Pennsylvania statutes providing for taking lands for country roads they were not subject to the same easements as city streets, and the construction of an electric railway imposed a new servitude for which the land-owners were entitled to compensation.⁶

¹ 2 Pa. Dist. Ct. Rep. 450, 4 Am. El. Cas. 160 (1892).

² *Central Pass. Teleph. & Supply Co. v. Wilkesbarre & W. S. Ry. Co.*, 11 Pa. Co. Ct. Rep. 417, 4 Am. El. Cas. 260.

³ *Thomas v. Inter-County St. Ry. Co.*, 167 Pa. St. 120, 31 Atl. Rep. 476, 5 Am. El. Cas. 175 (1895).

⁴ In New Jersey an injunction in such a case was refused on the ground that the plaintiff as abutting owner had not such a special interest in the matter as to entitle him to relief, but that the remedy was by indictment. *Borden v. Atlantic Highlands, etc. Ry. Co.*, *infra*, p. 174, 18 N. J. L. J. 305, 33

Atl. Rep. 276, 5 Am. El. Cas. 179 (1895). But on an application made by the attorney-general with respect to the same railway, a preliminary injunction was granted. *Stockton v. Atlantic Highlands, etc. Ry. Co.*, 53 N. J. Eq. 418, 32 Atl. Rep. 680 (1895).

⁵ *Patterson v. Pittston, Pa. Com. Pleas*, 8 Kulp, 530 (1897); *Rafferty v. Central Traction Co.*, 29 W. N. C. 542, 23 Atl. Rep. 884; *Collins v. Carbon-dale Traction Co.*, 5 Pa. Dist. Rep. 18; *Phila. & T. R. Co. v. Phila. & B. Pass. Ry. Co.*, 6 Pa. Dist. Rep. 487.

⁶ *Heilman v. Lebanon & A. St. Ry. Co.*, 145 Pa. St. 23, 4 Am. El. Cas. 152; *Penn. R. R. Co. v. Montgomery Co.*

§ 141. **Later cases in New Jersey — In chancery.**— The decision of Vice-Chancellor Van Fleet in the Halsey case in New Jersey was followed the next year by Vice-Chancellor Green in a well-considered opinion. It was a bill by a street railway company praying for an injunction against cutting the electric feed wire suspended in front of the defendant's houses. There were no poles in front of his land, and the wire was stretched along the line of the curbstone about twenty-two feet above the ground. The vice-chancellor said that if the use of the street for an electric railway was authorized by statute the rights of the defendant were subject thereto, unless such use imposed an additional servitude; that the special rights of the abutting owner were the *quasi*-easements of light and air, the right of ingress and egress, and the right to have the upper stories free of obstruction in case of fire or other emergency; and it was obvious, he said, that the wire could not interfere with any of these except the last, and as to this there was no proof of any danger, or that it could not be quickly and safely removed in case of emergency, and he held that the act of the complainant in stringing the wire in front of the defendant's premises, if authorized by statute,¹ was not such an invasion of the defendant's rights of adjacency as to entitle him to compensation.

§ 142. **Later cases — New Jersey — Supreme court and court of errors.**— In *Roebbling v. Trenton*,² in 1894, on an application by an abutting owner for a stay of proceedings on *certiorari* to an ordinance authorizing the construction of an electric railway in a city street, the New Jersey supreme court said: "It is doubtful whether the prosecutors or abutting owners have in the street any right which is violated by the erection and maintenance of trolley poles and wires in front of their premises under legislative authority." The application was denied, and the decision was afterwards affirmed by the court of errors on the ground that the ordinance did not necessarily involve the taking of private property without compensation, and was therefore not invalid.³

Pass. Ry. Co., 167 Pa. St. 62, 31 Atl. Rep. 468, 5 Am. El. Cas. 166.

² 29 Atl. Rep. 149, 5 Am. El. Cas. 136 (1894).

¹ He held that it was so authorized. See the discussion of this case in ch. II, § 23, p. 26.

³ *Roebbling v. Trenton* Pass. Ry. Co., 58 N. J. L. 666, 34 Atl. Rep. 1090 (1895); p. 173, *infra*.

In *West Jersey Ry. Co. v. Camden, Gloucester & Woodbury Ry. Co.*,¹ a steam railroad company sought to enjoin the crossing of their line by a trolley railway on a public street, claiming rights as owners of land fronting on the street. The chancellor (McGill) said: The ownership of the fee in the soil of a public street was subordinate to the use of it for the purposes of a highway, but that the means of such use could not be definitely defined, but changed with the increase of population and with new wants and improvements. The horse railway had been held to be a lawful servitude, while the steam railway had been found to be incompatible with the common use of the highway. The electric railway as now ordinarily in use stands in a degree between the horse and steam railway. Its rails do not materially interfere with the ordinary use of the highway; its motive power, while greater than that of the horse car, does not involve the noise and danger of the steam locomotive and train of cars; and although its capacity for speed is great, this is subject to municipal control. As at present operated, therefore, he said he thought the use of the electric railway in the streets did not impose a new servitude upon the land nor entitle the abutting owner to compensation. He made the suggestion, however, that this question depended very much upon the mode of operation of the railway; and that if the electric railway should be operated with trains of cars for through traffic to the obstruction of other uses of the street and without any accommodation to the ordinary local travel, the court might be obliged to declare it incompatible with the ordinary uses and an additional servitude upon the land.

With respect to the planting of poles near the curbstone, the chancellor said that posts of various kinds had been placed there for various purposes incidental to the use of the highway and were not regarded as an additional burden, and it was difficult to perceive why poles which accommodate a convenient use of the highway by a street railway should be regarded differently from these. He added, however, that if they actually interfered with access to the land or injured improvements made by the land-owner in the sidewalk, he might be entitled to compensation.

¹52 N. J. Eq. 31, 29 Atl. Rep. 423, 5 Am. El. Cas. 137 (June 12, 1894).

Before this, however, the supreme court in another case approved and followed the conclusions of the court of chancery above referred to. In *Kennelly v. Jersey City*¹ the question arose directly whether the trolley system, involving the erection of poles and wires in the streets, is within the public easement over urban highways, and the court decided that it was. Dixon, J., reading the opinion of the court, said: "That easement includes the right to use the street for purposes of passage by the public, and therefore to employ any means directly conducive to that end which do not substantially interfere with the customary use of the street by any portion of the public or with the recognized rights of abutting owners. The cars propelled by the trolley system do not materially differ, either in appearance or use, from the ordinary horse cars. They are permitted to go along the street in such a manner only as is compatible with the customary modes of travel by others of the public.² And the tracks, poles and wires cause no greater detriment to adjoining property than do the tracks, sewers, pipes, posts and trees which, indisputably, the public may authorize to be placed in the street. These considerations, we think, lead to the conclusion reached by the learned vice-chancellor of this state in *Halsey v. Rapid Transit St. Ry. Co.*,³ and *Paterson Ry. Co. v. Grundy*,⁴ and by the learned chancellor in *West Jersey Ry. Co. v. Camden, G. & W. Ry. Co.*,⁵ that the adoption of the trolley system for the conveyance of passengers through the streets of a city does not necessitate the invasion of any private right."

Afterward the court of errors affirmed the judgment of the supreme court in the Roebing case.⁶ It was a *certiorari* to an ordinance authorizing a horse railroad company to use electric motors, and put up poles and wires in the streets, and the court refused to set aside the ordinance as an attempt to take private property without compensation. Depue, J., reading the opinion of the court, said: "I agree with those cases in our courts which hold that the substitution of the trolley system for horses on

¹ 57 N. J. L. 293, 30 Atl. Rep. 531,

⁵ Am. El. Cas. 146 (Nov. 8, 1894).

² Newark Pass. Ry. Co. v. Block, 55 N. J. L. 605.

³ 47 N. J. Eq. 380, 391.

⁴ 51 N. J. Eq. 213-223.

⁵ 52 N. J. Eq. 31.

⁶ Roebing v. Trenton Pass. Ry. Co., 58 N. J. L. 666 (1896), 34 Atl. Rep. 1090.

street railroads does not *per se* create an additional easement. The injury to property which would give the prosecutrix a legal ground of complaint does not spring from the kind of motors used." With regard to the contention that the poles were erected on the land of the prosecutrix, and that to this extent there was a taking of private property, the court avoided a direct decision, and said that the statute which underlay the ordinance made no provision for the condemnation of private property, and purported only to confer the public easement, and to make it the duty of the municipality to designate the location of the poles with a view to the public convenience, leaving it to the companies to negotiate with the land-owners if any private rights were interfered with. The ordinance, therefore, was not invalid, and if any private property were taken by reason of the planting of the poles, or injured by reason of the mode of operation of the railway, the land-owners had their remedy by suit against the company.

These decisions related to city streets, and in a case decided in June, 1895, the chancellor declared that it was still an unsettled question in New Jersey whether the construction of an electric railway did not impose an additional servitude upon a country highway. It had been decided in Pennsylvania that it did, but that decision rested, he said, upon the statutes by which land is acquired for country roads in that state, and there had been no decision in New Jersey upon the claim now made that there is a marked distinction between the servitude of land for country roads and that of land for city streets.¹

§ 143. **Later cases in other states.**—In New York the controversy between the telephone companies and the electric railway companies with regard to the right to use the streets for their electric currents resulted in a decision that the electric railway was a proper use of the streets within the purposes for which streets were laid out;² and, as a consequence, it has been held that the rights of abutting owners who do not own the

¹Borden v. Atlantic Highlands, etc. Ry. Co., 18 N. J. L. 305, 33 Atl. Rep. 276, 5 Am. El. Cas. 179; Penn. R. R. Co. v. Montgomery Co. Pass. Ry. Co., 167 Pa. St. 62, 31 Atl. Rep. 463, 5 Am. El. Cas. 160. See, however, ch. VIII, § 104.

²Hudson River Teleph. Co. v. Watervliet Turnpike & R. R. Co., 56 Hun, 67, 121 N. Y. 397, 135 N. Y. 393. These cases are fully discussed in ch. II, § 24, and ch. XIV, §§ 213, 214.

fee are not affected by the mere changes of motive power from horse power to electricity.¹

In a recent case relating to a street railroad in New York city, where the wires were laid in a conduit underground, the supreme court held that it could not be inferred that, even with the use of four tracks and electric power, there would be an exclusive appropriation of a portion of the street to other than the customary street uses, and that that would depend upon the speed and frequency with which the cars were run; but it was held that the consent of a certain proportion of the property owners must first be obtained, because the statute required the consent of the property owners to the kind of motive power proposed to be used for a street railway.²

In *Dean v. Ann Arbor St. Ry. Co.*³ (October 27, 1892), the supreme court of Michigan re-affirmed its decisions in *Detroit City Ry. Co. v. Mills* and *People v. Ft. Wayne, etc. Ry. Co.*⁴

In a case in Utah in 1895, the supreme court held that whether the fee of the land in the street be in the municipality or in the abutting owner, the abutter has the easements of access, and of light and air, which are property rights of which he cannot be deprived without compensation; and that although an electric railway is a legitimate use of the street for which, as a general thing, no compensation need be made, yet the abutting owner is entitled to an injunction against the laying of a third track and the erection of additional poles which would affect the access to his land and injure his property.⁵

In a case in Texas decided in the same year, it was held that the construction of an electric railway in a street where there were already two tracks did not impose an additional burden upon the land, although the line was near the curbstone, and the running of the cars interfered with the plaintiff's business. The court said it had been decided in Texas that horse railroads did not impose an additional burden on the street, and that the authorities were all agreed that there was no distinction in this respect between an electric railway and a horse rail-

¹Trelford v. Coney Island, etc. R. R. Co., 39 N. Y. Supp. 20; Lakeland v. Same, id. (N. Y. Sup. Ct., 1896).

³93 Mich. 330, 53 N. W. Rep. 396, 4 Am. El. Cas. 172.

⁴92 Mich. 522, 52 N. W. Rep. 1010.

²St. Michael's Church v. Forty-second, etc. Ry. Co., 57 N. Y. Supp. 881 (1899).

⁵Block v. Salt Lake City Rapid Transit Co., 8 Am. R. R. & Corp. Rep. 327, 4 Am. El. Cas. 139.

way.¹ The electric cars had no exclusive rights in the street, and the use of them is subject to the plaintiff's right of access.

And in another case it was held by the Texas court of appeals that when the fee of the street is in the public and the majority of the abutting owners have consented to the grant of a right to construct the line in the street, the building of the railroad is not a "taking" of private property, and equity will not grant an injunction, but will leave the owners to their remedy at law with respect to their claims for damages.²

§ 144. A different view in Nebraska.—Another view of the matter was taken by the supreme court of Nebraska. Ragan, C., in a case decided in 1898,³ discussed many of the authorities cited in this chapter; and, while admitting that the use of the street by the electric cars was practically the same as that of horse cars, he criticised the assumption made in some of the cases that the electric railway did not occupy the street any more exclusively than the horse railway did, and said: "Whether a use made of a street is an additional burden upon the easement we do not think depends upon the motive power which moves the vehicle employed. It depends upon the question whether the vehicle and appliances used in and necessary to effectuate that purpose, permanently and exclusively occupy all or a portion of the street to the exclusion of the rest of the public. If they do not, then it is not an additional burden; if they do, it is." The case was heard upon demurrer to a bill which alleged that the poles and wires and passage of trains interfered with the plaintiff's ingress and egress and depreciated the value of her property. Ryan, C., who concurred in the judgment, said he preferred to place his concurrence on narrower grounds, and, referring to these averments in the bill, said he thought that if poles and wires were so placed as to interfere with the plaintiff's ingress and egress and her view from her premises, and her property had depreciated in value, she was entitled to redress in view of that provision of the constitution of Nebraska which declares that

¹ *Limburger v. San Antonio Rapid Transit St. Ry. Co.*, 88 Tex. 79, 5 Am. El. Cas. 156. 352. See also *Stewart v. Chicago G. St. Ry. Co.*, 53 Ill. App. 446.

³ *Jaynes v. Omaha St. Ry. Co.*, 53

² *Gray v. Dallas Terminal Ry. Co.*, 13 Tex. Civ. App. 158, 36 S. W. Rep. 67 (1898).

“the property of no person shall be taken or damaged without just compensation therefor.”

Without quoting other cases in detail, it is enough to say that it has now been decided in many other states that the change of motive power from horse to electricity does not of itself change the character of a street railway or the rights of the abutting owners with respect thereto, and that an electric street passenger railway in city streets, operated by electricity by means of wires overhead supported on poles placed on the edge of the sidewalk or underground in a conduit, does not impose an additional burden on the fee of the land in the street so as to entitle the land-owners to compensation.¹

§ 145. **Conclusions.**—It is no doubt true that all railroads do affect in some degree the use of a street; they do claim some exclusive use; they divide the street into two parts; and if it is narrow, they make it impossible to leave a wagon standing at the curbstone. The electric road may have some additional elements of danger and obstruction, and it may well be that the solution of the difficulty is to be found in the suggestion that a person who suffers actual damage shall be entitled to compensation for the injury he sustains. Whether the operation of the railroad is a new burden is a different question, and it might tend to a reconciliation of the cases and the adoption of a uniform rule if the question of new burden were left on one side, and the attention were directed to the practical question whether or not the rights and privileges of the abutting owner in the use of the street were affected by the operation

¹Taylor v. Portsmouth, K. & Y. St. Ry. Co., 91 Me. 193, 39 Atl. Rep. 560 (1898); Howe v. West End St. Ry. Co., 167 Mass. 46, 44 N. E. Rep. 386, with note (1896); Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. Rep. 1107; Reid v. Norfolk City Ry. Co., 94 Va. 117, 26 S. E. Rep. 428, 36 L. R. A. 274 (1899); Merrick v. Intramontaine Ry. Co., 118 N. C. 1081, 24 S. E. Rep. 667 (1896); Phila., W. & B. R. R. Co. v. Wilmington City Ry. Co. (Del. Ch.), 38 Atl. Rep. 1067 (1897); Birmingham Traction Co. v. Birmingham Ry. & Elec. Co. (Ala.), 24 S. Rep. 502 (1898); Cumberland Teleg. & Teleph. Co. v. United Electric Co., 93 Tenn. 492, 29 S. W. Rep. 104 (1894); Stewart v. Chicago G. St. Ry. Co., 58 Ill. App. 446 (1895); Chicago & W. I. R. Co. v. General Electric Ry. Co., 79 Ill. App. 569 (1899); Placke v. Union Depot Ry. Co., 140 Mo. 634, 41 S. W. Rep. 915 (1897); Sells v. Columbus St. Ry. Co. (Ohio), 28 Wkly. L. B. 172, 4 Am. El. Cas. 163.

As to the right of action for placing a trolley pole in front of plaintiff's premises without necessity and in such a way as to cause annoyance and damage, see Snyder v. Ft. Madison St. Ry. Co., 105 Iowa, 284, 75 N. W. Rep. 179 (1898).

of the railroad. It is not the motive power, but the mode of using the street, which determines the question whether the railroad constitutes a new burden upon the land; and if the railroad is not a new burden, the poles and wires, being in fact a part of the railroad and intended for the purpose of operating it, do not constitute a burden and are not an injury to the land-owner, unless, as a matter of fact, they obstruct the access to the street or in some way affect his right to the use of the street in connection with his land.

It seems to be now generally accepted in the light of experience that a street railroad, for carrying passengers in a city street, operated with due regard to the rights of pedestrians and vehicles of every kind, is a proper use of the street, of which the land-owner has no legal ground to complain; that such a railway may be operated by electricity without affecting the rights of the land-owner; and that if the use of electric power be duly authorized, the necessary wires may be strung along the street, either overhead or underground, and that the use of so much of the land in the street as may be required for poles or conduits is not a taking of the property of the abutting owner.

§ 146. The electric railway on rural highways — Mode of use the criterion.— This conclusion applies to the electric railway used for the same purposes as horse cars, and operated on the streets of a city. Since the reasoning is based upon the purpose of the use, it may well be that if cars were run at a high rate of speed along a country road from one town to another in such a way as to afford no access to abutting land, or so as to make the use of the street dangerous for ordinary travel, or so as to take exclusive possession of a part of the street, it would be held that this was in fact a perversion of the use of the street.¹ In short, if the electric railway were used like the steam railway, it would be classed with it and be subject to the same ruling; and if the electric motor were used as the steam dummy is used, it would, like the dummy, be in a

¹ See, however, *Pelton v. East Cleveland R. R. Co.*, Ohio (Cuyahoga Com. Pleas), 22 Week. Bull. 67, where it was held that the fact that a speed of twelve miles an hour was authorized made no difference with respect

to the right of the owner to compensation, the speed being a matter upon which it was competent for the city council to legislate. See also *Nichols v. Ann Arbor & Ypsilanti R. R. Co.*, 87 Mich. 361, 49 N. W. Rep. 538.

doubtful position. Chancellor McGill, of New Jersey¹ (in a case decided since this was written in the first edition), suggested that if with the great motive power of the electric railway the attempt should be made to use the highways by trains of cars or by rails and cars of such a character and size as practically to work all the evils of a steam railway, and to have a system of through cars for rapid transit between distant points, which burden the street without accommodating the local use of it, this might be so incompatible with the common use of the street that the courts might make a distinction and be obliged to declare against this as creating an additional servitude; "the crucial test for that distinction being whether the use contemplated is compatible with the purpose for which the highway was originally designed."² This principle was afterwards applied by the supreme court of Pennsylvania in a case arising under the statutes of that state,³ and the court held that although the construction of an ordinary passenger railway in a city street was not a new servitude, yet there was a distinction between urban and suburban property as to the right of corporations to occupy a public highway for a street passenger railway.⁴

The question afterwards arose in Wisconsin in two cases, in one of which the railway was to carry freight as well as passengers. Street railways had been authorized to extend their lines from one town to another and operate their cars by "other power" than horse power, and to carry either passengers or freight;⁵ and in a case in which it appeared that the defendant's proposed electric railway was part of a line connecting two or more towns, and intended for the carriage of merchandise and mail as well as passengers, the court held that this was in fact a "commercial railroad," and that the use of the streets for such a railroad constitutes an additional burden upon

¹ West Jersey R. R. Co. v. Camden, G. & W. Ry. Co., 52 N. J. Eq. 31, 29 Atl. Rep. 423, 5 Am. El. Cas. 137 (1894).

² Pennsylvania R. Co. v. Montgomery Co. Pass. Ry. Co. (Pa. St.), 31 Atl. Rep. 463 (1895).

³ See also Borden v. Atl. Highlands Ry. Co., 18 N. J. L. Jour. 305, 33 Atl. Rep. 276 (1895).

⁴ Chicago & N. W. Ry. Co. v. Milwaukee R. & K. Elect. Ry. Co., 95 Wis. 561, 70 N. W. Rep. 673 (1897).

⁵ Sanborn & B. Ann. Stat., §§ 1862, 1863. Cited and limited by McGill, C., in Borden v. Atlantic Highlands Ry. Co., 18 N. J. L. J. 305, 33 Atl. Rep. 276 (1895).

the land, for which the abutting owner is entitled to compensation. The subject was more fully discussed the next year by the same court¹ in a case in which the defendant was the Milwaukee Electric Railway & Light Company, engaged in carrying passengers only, but the peculiar feature of the case was that the company proposed to change the grade of the street and cut it down about eight feet in front of the plaintiff's lands, leaving them twelve or fourteen feet above the level of the street. The plaintiff's lots were situated on a country road about a mile and a half from the limits of the city of Milwaukee. The court said it had long since been settled in Wisconsin² that a horse railroad constructed upon the grade of the street and by permission of the city authorities was not an additional burden upon the fee, and after citing the recent cases in Wisconsin and Nebraska, above referred to, said:

"We have been referred to no case which squarely holds that the mere fact that the cars upon a street railway in a city street are propelled by electricity by the overhead trolley system instead of by animal power makes the railway, as a matter of law, an additional burden, although very vigorous dissenting opinions to that effect may be found in *Detroit City Ry. Co. v. Mills*.³ The question has not been presented to this court, and hence has not been decided, and cannot be decided now. The question here presented is whether such a railway is an additional burden when it is to be operated in a country town and when the company proposes to grade down the highway for the purpose of laying their track to such an extent as to seriously impair the right of access of adjoining lot-owners." Upon both these considerations the court held that the railway in this case was an additional burden. The company, although acting under the permission of the authorities in grading the street, was acting solely in its own interest, and, the land-owner's access being cut off or impaired for the benefit of the company, he is entitled to compensation. The electric railway line on a country road is very different in its purpose and effect from such a railroad in the streets of a city. It is built and

¹ *Zehner v. Milwaukee Elect. Ry. & Light Co.*, 99 Wis. 83, 74 N. W. Rep. 538 (1898).

² *Hobart v. Milwaukee City R. R. Co.*, 27 Wis. 194 (1870).

³ 85 Mich. 634, 48 N. W. Rep. 1007, quoted in ch. X, § 138, *supra*, p. 166.

operated mainly to obtain through travel from city to city, and only incidentally to take up a passenger in the country town. It carries passengers who otherwise would take the steam railway, and burdens the road with travel rather than relieving it of other vehicles. The difference is not so much in the change of motive power as in the wholly different kind of use. "Our conclusion is that an inter-urban electric railway running upon the highways through country towns is an additional burden upon the highway."

CHAPTER XL

RIGHTS OF ABUTTING LAND-OWNERS, HOW ACQUIRED — CONSENT — CONDEMNATION.

§ 147. **Consent of abutting owners as a condition precedent.**—If the owner of abutting land has legal rights which are affected by the use of the street by electric wires for a particular purpose, his consent must be obtained or the rights must be condemned before the wires can be strung or the posts set up in the street; but even though there be no legal right affected, the interests of the owners of the land along the street are usually protected to a certain extent by statutes providing that electric railways or telegraph or electric-light lines shall not be constructed in any street without the consent of the owners of a certain proportion of the land. In this case, whether the construction of the line affects any legal right or not, it is a condition precedent to the right to construct the line that the requisite consent should be obtained. If no legal right is affected and the requisite consents be obtained, a dissenting land-owner is not entitled to an injunction nor to damages; but if the line is one that is considered as imposing a new burden, and the land-owners have property rights that are affected by the new use of the street, then the right to construct the line can only be obtained with the consent of all the land-owners or by the exercise of the right of eminent domain.

§ 148. **The right to an injunction.**—The land-owner whose rights of property are affected is entitled to an injunction if the work is undertaken without his consent or without proceedings to condemn; but if the line is not a new burden and no rights of property are affected, the legal rights of the abutting owner are no greater than those of any other person, and under the general rule of equity procedure he is not entitled to an injunction against the occupation of the street for a line of wire, even though the requisite consents have not been obtained or the right to use the street has for some other reason not been secured.

It was held in New Jersey that a land-owner was entitled to an injunction where the statute gave the right to set up poles with the consent of the owner of the land and gave the right to condemn, but no consent was asked and no proceedings to condemn were taken;¹ but in a later case,² in which an abutting land-owner asked for an injunction against an electric railway on the ground that the requisite consents of land-owners had not been obtained, the chancellor said that it had not been decided in New Jersey whether or not an electric railway was a new burden upon the fee of the land in a rural highway, and that since the legal right of the plaintiff was not clear he was not entitled to a preliminary injunction. He said one who asks for an injunction against the obstruction of a public highway must show some legal right in himself that is affected which he does not hold in common with the public.³

So also in Delaware it was held that where the act of an electric street railway in crossing the tracks of a steam railroad does not work some damage to it differing in kind from the damage suffered by the rest of the community, the railroad company has no standing to ask for an injunction merely because the act of the electric railway company is *ultra vires* or unauthorized.⁴

In a recent case in New York, however, where the consent of property owners was held to be requisite to the change of motive power of a horse railway to electricity, an injunction was issued on the application of an owner of property on the line of the street, although it was held that the change did not involve an appropriation of the street to new uses.⁵

An injunction may always be obtained by the local authorities if an attempt is made to exercise the franchise without

¹ Broome v. N. Y. & N. J. Teleph. Co., 42 N. J. Eq. 141 (1886).

² Borden v. Atlantic Highlands, etc. Ry. Co., 18 N. J. Law Journ. 308, 33 Atl. Rep. 276, 5 Am. El. Cas. 179 (1895).

³ See also Stockton v. Atlantic Highlands, etc. Ry. Co., 32 Atl. Rep. 680, 53 N. J. Eq. 418.

⁴ Phila., W. & B. R. R. Co. v. Wilmington City Ry. Co. (Del. Ch., 1897), 38 Atl. Rep. 1067.

⁵ St. Michael's Church v. Forty-

Second St. etc. Ry. Co., 57 N. Y. Supp. 881, 26 Misc. Rep. (N. Y.) 601 (1899).

See also O'Brien v. Buffalo Traction Co., 52 N. Y. Supp. 323 (1898), in which it was held that in a suit for injunction the burden of proof is on the plaintiff to show that the requisite consents have not been obtained. Consult McLean v. Westchester Electric Ry. Co., 55 N. Y. Supp. 556, 25 Misc. Rep. (N. Y.) 383 (1898).

obtaining the required consent or otherwise complying with the conditions precedent,¹ and the attorney-general may file an information in the nature of a *quo warranto*.²

§ 149. *Requisites of the consents.*—The form and manner in which the consent of property owners must be expressed depends upon the terms of the statute by which they are required. They must, of course, be in writing, and it is commonly required that they be acknowledged as deeds of land are directed to be acknowledged. The question often arises whether the specified portion of the frontage is that of each street or of the whole route, and this also depends upon the language of the statute. In Ohio it has been held³ that under section 3439 of the Revised Statutes, requiring the consent of owners of more than half of the feet front of the lands abutting on “the street or public way,” the use of the singular number indicates that, if more than one street is to be occupied, the consent of the owners on each street must be obtained. It is not necessary, under the Revised Statutes of Ohio (par. 2502), that the property holders should consent to the mode of construction and manner of operation of a street railway.⁴ It has also been held in Ohio, that, where the consents are presented to the council before the grant is made, it is sufficient, although they had not all been obtained before the publication of the notice,⁵ and that the consents need not be entered on the records of the council;⁶ and that consents given to an ordinance which proves to be invalid may be used to make up the requisite number for a later valid ordinance;⁷ and that consents are not required for the operation of an electric railway on existing tracks.⁸ In New York consent of the owners of one-

¹ Franklin Township v. Nutley Water Co., 53 N. J. Eq. 601; Wandsworth Board of Works v. United Teleph. Co., 13 Q. B. Div. 904; Mayor of Davenport v. Plymouth, etc. Tramways Co., 52 Law T. R. 161.

² Stockton v. North Jersey Ry. Co., 54 N. J. Eq. 263. But a bill filed in the name of the attorney-general was dismissed when it appeared that it was filed not for the purpose of protecting any public right, but only for the benefit of a rival company. People

v. General Electric Ry. Co., 172 Ill. 129, 50 N. E. Rep. 158 (1898).

³ Neare v. Mt. Auburn Cable Ry. Co. (Cincinnati Super. Ct.), 29 Wkly. Law Bull. 171, 42 N. E. Rep. 768.

⁴ Sloane v. People's EL Ry. Co., 7 Ohio Cir. Ct. Rep. 34.

⁵ Ibid.

⁶ Sanfleet v. Toledo, 10 Ohio Cir. Ct. Rep. 460.

⁷ Ibid.

⁸ Ibid.

half in valuation of the frontage is required to the change of motive power of a street railway.¹ It has been held in New York that an order once granted declaring that sufficient consents had been obtained is not reviewable by the railroad commissioners in the absence of express statutory authority to that effect,² and also that the consent of property owners is not requisite to the laying of a connecting curve of a street railway,³ nor to contracts relating to traffic.⁴

§ 150. **Condemnation of rights of abutting owners—Introductory.**—Condemnation, of course, is unnecessary when no legal rights are affected, and it is only when the line is a new burden upon the fee that proceedings to condemn need be taken in order to construct lines of electric wires in a public highway. The old statutes relating to the telegraph in many of the states have required the consent of land-owners to be obtained before poles are set up in front of their land, and have provided for condemnation in case of refusal, and similar provisions have been made with respect to the telephone and electric light. But while the consent of the majority of the frontagers on the streets is required in many states for the construction of an electric railway, there are as yet, I believe, no statutes providing for the condemnation of the rights of those who will not consent, and such statutes will only be necessary when it has been determined that their rights are affected by the use of the streets for that purpose.⁵

¹ *St. Michael's Church v. Forty-Second St. etc. Ry. Co.*, 57 N. Y. Supp. 881, 26 Misc. Rep. 601 (N. Y., 1899). There is a discussion in this case of the construction of the statute requiring consents as to street railways.

² *People v. Board of Railway Commissioners*, 156 N. Y. 693, 51 N. E. Rep. 1093 (1898).

³ *Kunz v. Brooklyn Heights Ry. Co.*, 25 Misc. Rep. (N. Y.) 334, 54 N. Y. Supp. 187.

⁴ *Ibid.* With regard to the consent of property owners in New York as to street railways, see also *In re Saratoga Electric Ry. Co.*, 58 Hun, 287, 12 N. Y. Supp. 318.

⁵ There are provisions for the condemnation of private land actually taken for the electric railway as well as for telegraph and other lines, but these do not necessarily apply to the rights of abutting owners on the construction of lines in the streets. In Pennsylvania, where it is held that an electric railway is a new burden upon a country highway, it has been decided that the act of 1889 authorizing and regulating the construction of street railways confers no right of eminent domain as against abutting owners. *Penn. R. R. Co. v. Montgomery Co. Pass. Ry. Co.*, 167 Pa. St. 62, 5 Am. El. Cas. 166 (1895).

§ 151. Statutes of some of the states providing for condemnation.—It would be beyond the scope of this discussion to quote in detail the provisions of the statutes of all the states on this subject, but it may be well to refer to some of them by way of showing what private rights are recognized and what provision is made for compensation to abutting owners.

In Ohio the county commissioners are to appoint appraisers to assess the damages of persons over whose lands telegraph lines shall pass or on which the posts or piers shall be built.¹

In Massachusetts it is provided that if property abutting on a highway is in any way injuriously affected or lessened in value, whether by occupation of the ground or air, or otherwise, by the construction of telegraph, telephone, electric-light or electric-power lines, the owner, whether he is the owner of the fee in the way or not, may apply to the mayor or aldermen or to the selectmen to assess his damages.²

In Connecticut it is declared that no telegraph, telephone or electric-light company, or company engaged in using electric wires or conductors for any purpose, may exercise any power conferred upon it, on or under any highway or public ground, or change the location of the same, without the consent of the adjoining proprietor, or, in case such consent cannot be obtained, without the consent in writing of two of the county commissioners, which shall only be given on hearing after due notice. The common council or selectmen have full direction and control as to the placing and removal of wires, subject to an appeal to a judge of the supreme court, who may appoint three commissioners to appraise damages.³

In Illinois provision is made for paying for property taken or injured.⁴ In Indiana the power of eminent domain, with the right of assessment, is given to telegraph and telephone companies.⁵ In California the county court is authorized to appoint three commissioners to assess damages.⁶

In New Jersey provision was made in 1890 for the appointment by the circuit court of three commissioners to assess dam-

¹ Act of July 8, 1847, Ohio Rev. Stat. 1890 (8746). See also (8752), (3454), (3455), (3456), (3459).

² Laws 1882, ch. 109, Gen. Stat. Mass. 1884, ch. 306.

³ Laws 1887, ch. 33, Gen. Stat. Conn. 1888, §§ 3943-3954.

⁴ Rev. Stat. Ill., ch. 134.

⁵ Ind. R. S., chs. 42, 43, §§ 4162, 4192.

⁶ Act of April 22, 1850, Cal.

ages to owners of the soil of any road or highway along which a telegraph or telephone line is to be constructed.¹

In the revised laws of Vermont there is a provision that when, in the erection of a telegraph line, the owner or occupant of lands or tenements sustains or is likely to sustain damage thereby, the selectmen of the town shall appraise such damage, and the same shall be paid before the line is erected; and the decision of the selectmen shall be final, notice being given as provided in the statute.²

So also in New Hampshire it is provided that if any person shall be aggrieved or damaged by the erection of electric wires or poles, or by the stretching of such wires, or by the use made of the same, he may apply to the mayor and aldermen or the selectmen to assess the damages which he claims are occasioned thereby, who shall give notice to the proprietors and all others interested; and, after hearing all parties, may award such damages as may be legally and justly due.³

In Louisiana telegraph companies are given a right of way over all lands owned by the state, and over any highways and navigable waters, but they must so construct their works as not to interfere with, impede or hinder the free use of the highways or navigable waters or drainage or natural servitudes of the land, and no provision seems to be made for compensation.⁴

There are many states, however, in which no provision for compensation to abutting owners is made.⁵

§ 152. Condemnation for the telegraph and the telephone — They are public uses.—The telegraph is a public and not a private use,⁶ and statutes authorizing the condemnation

¹ Laws N. J. 1890, ch. 298.

² Rev. Laws Vt. 1880, § 3637.

³ Laws N. H. 1881, p. 472, § 6.

⁴ Laws 1855, 109; Rev. Laws La., 1870, § 3760.

⁵ For a list of the compilations of American statutes on the telegraph and telephone, see note to § 47 in chapter VI, *supra*. For an account of the legislation in every state relating to the condemnation of property in connection with various municipal franchises, see Economic Legislation of all the States, or the Law of In-

corporated Companies Operating under Municipal Franchises, by Allen R. Foote, Cincinnati: Robert Clarke & Co., 1892; subdivision III in the section relating to each state. And for an abstract of the statutes relating to the electric railway in each state from year to year, see American Corporation Legal Manual (Plainfield, N. J.), in the chapter on Street Railways, by the editor, Charles L. Borgmeyer.

⁶ *Pierce v. Drew*, 136 Mass. 75, 1 Am. El. Cas. 571; Central Un. Teleph. Co.

of private property for the construction of a telegraph line are not unconstitutional, and this even though the telegraph company is not expressly required to serve all alike. The same is true of the telephone, which is only another form of telegraph, serving the same general purpose with the same electric current and with the same poles and wires, only delivering the message in a different way.¹ "They are both," says Mr. Justice Reed, of New Jersey,² "services of a public nature which would permit the legislature to confer the power to condemn for each use."

§ 153. **The same — Right acquired only such as is necessary.**— The right acquired under proceedings for condemnation is only such as is necessary to put up and maintain the poles and wires.

Under the statute of Illinois (Rev. Stat. 47, Eminent Domain, and Rev. Stat. 134, Telegraphs), it has been held that the company does not acquire a fee in the strip of land described in the proceedings, and acquires an exclusive use of only such land as

v. Bradbury, 106 Ind. 1, 5 N. E. Rep. 721, 2 Am. El. Cas. 14; State v. Postal Telegr. Co., 47 Fed. Rep. 633; New Orleans M. & T. R. R. Co. v. So. & Atl. Telegr. Co., 53 Ala. 211, 1 Am. El. Cas. 190; Gulf & S. F. Ry. Co. v. S. W. Teleph. & Telegr. Co. (Tex. Civ. App.), 45 S. W. Rep. 151 (1898). An electric light company is bound to serve all alike. Cincinnati H. & D. Ry. Co. v. Bowling Green (Ohio), 49 N. E. Rep. 121 (1898); State, Trenton & N. B. Turnpike Co. pros., v. American & European Commercial News Co., 43 N. J. L. 381. In this last case it was held that the statute imposed upon a telegraph company the duty of serving all alike, but the court said that it had not been established as a rule that in order to render the use public so as to give power to take private property, the duty must be expressly imposed upon a company to serve all who make reasonable demands upon it; *citing* Lumbard v. Stearns, 4 Cush. 60; Scudder v. Trenton Del. Falls Co., Saxt. 694, 729; Mills

on Em. Dom., §§ 14, 21. See also as to what constitutes a public use, Lewis on Em. Dom., ch. VII, and as to the telegraphs, § 172.

¹Mr. Bell's specification of his claim in the Telephone Cases, 126 U. S. 2; Attorney-General v. Edison Teleph. Co., 6 Q. B. Div. 244; Chesapeake & Potomac Telegr. Co. v. Balt. & Ohio Telegr. Co., 66 Md. 399, 2 Am. El. Cas. 416; Wisconsin Teleph. Co. v. Oshkosh, 62 Wis. 32; Hockett v. State, 105 Ind. 250, 5 N. E. Rep. 178; York Teleph. Co. v. Keesey, 5 Pa. Dist. Rep. 366, 6 Am. El. Cas. 107; Gulf, C. & S. F. Ry. Co. v. Southwestern Teleph. & Telegr. Co. (Tex. Civ. App.), 45 S. W. Rep. 151; Chesapeake & Pac. Telegr. Co. v. B. & O. Tel. Co., 66 Md. 410, 7 Atl. Rep. 810; Richmond v. So. Bell Teleph. & Telegr. Co., 85 Fed. Rep. 19; Northwestern Teleph. Exch. v. Chicago, M. & St. P. Ry. Co. (Minn.), 79 N. W. Rep. 315 (1899).

²State, Duke pros., v. Central N. J. Teleph. Co., 53 N. J. L. 341, 3 Am. El. Cas. 546, 21 Atl. Rep. 460 (1891).

is occupied by the poles, besides a right to enter and make repairs. The company cannot cultivate it nor maintain a fence along it. The land-owner need not erect a fence along the strip, and is not entitled to compensation for the expense of one.¹

§ 154. The same—Conditions precedent—Failure to agree. The courts will not exercise the power of condemnation unless the applicant has made an effort to purchase, and the petition should allege the inability of the parties to agree.² In a recent case in Mississippi, relating to a telegraph line, the court held that it was enough if it appeared from the record that an effort had been made by the telegraph company to adjust the matter by contract, and that no answer to the offer made had been returned within a reasonable time.³

§ 155. The same—Conditions precedent—Municipal authority.—Under a statute giving authority to construct a telegraph line after application to the legislative body of any incorporated city or town through which the line may pass, for a designation of the streets in which the poles may be erected, it has been held in New Jersey that a telephone (or telegraph) company cannot exercise the power of condemnation without having made an application for a designation of the streets;⁴ and in Pennsylvania and New York, where the consent of local authorities is necessary to the construction of a street railway

¹Lockie v. Mut. Union Teleg. Co., 103 Ill. 401, 1 Am. El. Cas. 425 (1882). See also § 160, *infra*.

²Mills, Em. Dom., § 107; Lewis, Em. Dom., §§ 301-304, 357. See also *infra*, § 159, note 8.

³Louisville, N. O. & T. Ry. Co. v. Postal Tel. Cable Co., 68 Miss. 806, 10 S. Rep. 74 (1891).

⁴Broome v. N. Y. & N. J. Teleph. Co., 49 N. J. L. 624, 2 Am. El. Cas. 259; Winter v. N. Y. & N. J. Teleph. Co., 51 N. J. L. 83, 2 Am. El. Cas. 272. These decisions were made in the supreme court, and when the former came before the court of errors, this court affirmed the judgment on another ground, and said: "Our conclusion on this point obviates the neces-

sity of expressing an opinion upon the other branch of the case, upon which the supreme court passed, and the act of 1887 (P. L. 119) has so changed the law that it is not a public utility that we should do so." N. Y. & N. J. Teleph. Co. v. Broome, 50 N. J. L. 432. The case of Winter v. The Telephone Co., however, was decided after this opinion of the court of errors, and maintained that a designation of the streets was essential to give the court jurisdiction over an application to condemn. The company had never applied for a designation, but acted on a designation made for another company, which was expressly made non-assignable.

within the limits of a municipality, it has been held that this consent is a condition precedent to the right to condemn private property (in one case a turnpike road) for the uses of an electric railway.¹

§ 156. The same—Conditions precedent—Consent of property owners.—Where the statute requires the consent of the owners of a certain portion of the abutting land as a condition of the right to construct the line, then this consent is a condition precedent to the right to condemn the property of others, and the petition for condemnation must aver that such consent has been obtained.²

§ 157. The same—Conditions precedent—Compliance with act of congress.—A telegraph company seeking to obtain by condemnation the privilege of using a bridge across a navigable stream must show that it has complied with the provisions of the act of congress by which authority is given to use the post road and cross the navigable waters of the United States, and proceedings to condemn will be dismissed when it appears that such a company has failed to file with the postmaster-general its acceptance of the restrictions and obligations of the act.³

§ 158. The same—Right of way over a turnpike.—A right of way for a telegraph over a turnpike may be taken on payment of compensation, and without an express grant of authority to construct the line on a turnpike. The right to maintain a turnpike is a franchise, and a franchise cannot be condemned without express authority;⁴ but it has been held that a telegraph line does not materially affect the franchise of a turnpike company, and that the construction of a line on a turnpike needs no express grant, but, like the crossing of one

¹Harrisburg M. Elect. Ry. Co. v. Harrisburg C. & C. Turnpike Co., 15 Pa. Co. Ct. Rep. 339, 5 Am. El. Cas. 1 (1894); In re Rochester Elect. Ry. Co., 57 Hun, 56, 10 N. Y. Supp. 379; S. C. on appeal, 123 N. Y. 351. See also Geneva & W. Ry. Co. v. New York Cent. & H. R. R. R., 43 N. Y. Supp. 842, 24 App. Div. 335 (1898); Highland Ave. & B. Ry. Co. v. Electric Co., 113 Ala. 239.

²In re Saratoga Electric Ry. Co., 53 Hun, 237, 12 N. Y. Supp. 318.

³Chicago & Atchison Bridge Co. v. Pac. Mut. Teleg. Co., 36 Kan. 113, 2 Am. El. Cas. 274 (1887). See Telegraphs on Post Roads, ch. XII, *infra*.

⁴State, Trenton & N. B. Turnpike Co., pros., v. Am. & Eur. Com. News Co., 43 N. J. L. 381, 1 Am. El. Cas. 343 (1881).

railroad by another, is authorized by the general power to construct the line.¹

The petition to condemn, however, "should show that the telegraph company is limited in its right to erect poles to a specified width along the exterior line or lines of the pike, so that it may appear that it is not proposed to appropriate the franchise of the turnpike company, and the order should be equally definite." A petition for "permission to plant poles along the margin of said turnpike in such places along said turnpike road as not to interfere with the public travel of said road" was held to be insufficient.² The taking of a turnpike for the purposes of an electric railway might seriously affect the franchises of the turnpike company, but it is competent for the legislature by express language to provide for the condemnation of property devoted to one public use for the purposes of another, and turnpikes may be condemned for the use of the electric railway if distinct authority for that purpose be given.³

§ 159. **The same — Right of way of railroad — The right to condemn.**—The stretching of telegraph lines along a railroad does not seriously interfere with the use of the land for railroad purposes, and a federal statute passed in 1866⁴ giving the right to telegraph companies to make use of the post roads of the United States has been construed to extend to railroads.⁵ The nature and extent of the power thus conferred is discussed in a separate chapter,⁶ but reference may be made here to cases relating to the condemnation of the right of way of a railroad for the purpose of a telegraph line. Some of these cases will be referred to in the section relating to the requisites of the petition to condemn.⁷

¹ Turnpike Co. v. News Co., 43 N. J. L. 381.

² *Ibid.*, p. 386.

³ Harrisburg & M. Elect. Ry. Co. v. Harrisburg C. & C. Turnpike Co., 15 Pa. Co. Ct. Rep. 389, 5 Am. El. Cas. 1; *In re Rochester Elect. Ry. Co.*, 123 N. Y. 351, 25 N. E. Rep. 381. See *Ogden City Ry. Co. v. Ogden City*, 7 Utah, 207, 26 Pac. Rep. 288, 3 Am. El. Cas. 321-324. The question of the forfeiture of the charter of the rail-

way company by laches cannot be considered collaterally. *Turnpike Co. v. Jenkintown EL Ry. Co.*, 4 Pa. Dist. Rep. 8.

⁴ 14 U. S. Stat. 221; U. S. Rev. Stat., §§ 5263, 5268.

⁵ *Pensacola Teleg. Co. v. Western Union Teleg. Co.*, 96 U. S. 1; *Postal Teleg. Cable Co. v. Southern Ry. Co.*, 89 Fed. Rep. 190 (1893).

⁶ Ch. XII, *infra*.

⁷ § 174, *infra*.

The act of congress gives no power to condemn.¹ When such power is given by the laws of the states, it may be exercised under the usual conditions, and the only special questions that arise are those relating to the scope of the statute, the description of the property taken, the nature of the use and the measure of damages.

It has been held in Virginia² that a statute authorizing a telegraph company to construct its line (*inter alia*) "along and parallel to" any railroad, with power to take a right of way upon making compensation to the owners of lands taken, gave power to condemn a line on the right of way of a railroad company; and in Illinois³ it has been held that under a statute authorizing a telegraph company to construct lines "along and upon a railroad," with the right of eminent domain, a telegraph company may condemn a right of way lengthwise upon the right of way of the railroad company. In Texas it has been held that the county court of any one of several counties through which a railroad extends has power to condemn a right of way for a telegraph along the entire line, even though it is crossed by navigable streams.⁴

A real effort to agree upon compensation must be made before proceedings for condemnation can be taken, but such an effort is shown by evidence that the railroad company refused to make any agreement because of a prior agreement giving an exclusive right to another company.⁵

It has been held that a court of equity has not the power, on the ground of public necessity, to effect an equitable condemnation of an easement of a way for a telegraph line along a railroad, along which it was built and operated under a contract with a former owner of the road, whose estate had been sold under the foreclosure of a prior mortgage.⁶

§ 160. The same — Damages.— On the question of compensation, it has been held in Illinois that the land taken is only

¹ See ch. XII, § 184, *infra*.

² Postal Teleg. Co. v. Farmville & P. R. R. Co. (Va., 1899), 32 S. E. Rep. 468.

³ St. Louis & C. R. R. Co. v. Postal Teleg. Co., 173 Ill. 508, 51 N. E. Rep. 382 (1898).

⁴ Postal Teleg. Cable Co. v. Texas

& N. O. R. R. Co., 46 S. W. Rep. 912 (1898).

⁵ St. Louis & C. R. R. Co. v. Postal Teleg. Co., 173 Ill. 508, 51 N. E. Rep. 382 (1898).

⁶ Western Union Teleg. Co. v. Ann Arbor R. R. Co., 90 Fed. Rep. 379 (C. C. A., 1898).

that which is occupied by the posts, although other parts may be damaged by the erection of the poles and the stringing of wires, and that the railroad company may not show what rent was agreed to be paid by another company for the exclusive privilege of using the right of way, because such an agreement is invalid as creating a monopoly.¹ And in Alabama it has been held that the railroad company is entitled only to nominal damages for the taking of a part of its right of way not really used for the purposes of the railroad.² Under the statutes of North Carolina a telegraph company cannot enter into possession of the right of way of a railroad and construct its line until the damages have been assessed and paid into court;³ and the same is true wherever compensation is required to be *first made* before taking land for public purposes.⁴

§ 161. **Condemnation for electric-light line.**— There is no doubt that the furnishing of electric light for houses generally is a public use. It is analogous to the supply of water or gas or oil, and to the telegraph and telephone, all of which have been held to be public uses;⁵ and condemnation of private rights in the streets or of the title to land may be made whenever authority for that purpose is given. The use of the streets for electric-light lines, however, has generally been held not to impose a new burden on the land, and private rights are rarely affected by it.⁶ The lines are generally carried through the streets, and there are few cases to be found on the condemnation of lands for electric-light lines.⁷ If provision is made in the statute for condemning the easements incidentally affected or for taking the land itself, proceedings may be taken as in other cases of condemnation; but if there is no such authority, then the public

¹ St. Louis & C. R. R. Co. v. Postal Teleg. Co., 173 Ill. 508, 51 N. E. R. 382 (1898). See also ch. XI, § 153; ch. XII, § 179.

² Mobile & O. R. R. Co. v. Postal Teleg. Cable Co. (Ala., 1898), 24 S. Rep. 408.

³ Postal Teleg. Cable Co. v. Southern Ry. Co., 89 Fed. Rep. 190.

⁴ Birmingham Traction Co. v. Birmingham Ry. & Electric Co. (Ala., 1898), 24 S. Rep. 368.

⁵ Taylor v. Portsmouth, K. & Y. St. Ry. Co., 91 Me. 193, 39 Atl. Rep. 560 (1898), 10 Am. & Eng. Ency. of Law, 1072 (2d ed.).

⁶ See ch. IX, *supra*.

⁷ It has been held in Colorado that an *electric-light company* is a manufacturing corporation within the meaning of the act giving such corporations the right of eminent domain. *Lamborn v. Bell*, 18 Colo. 346.

rights alone can be taken, and consent must be obtained from the owners of land whose legal rights are affected.¹

§ 162. **Condemnation for electric-power lines.**—Lines merely for the distribution of electric power may well be held not to be within the proper uses for which the streets were laid out, but the same wires furnish both light and power, and there is no doubt but that the distribution of power from central sources will soon be a matter of such general interest as to be considered as one of the necessary uses to which the streets may properly be put. In the meantime, and whenever the use of the streets for this purpose is regarded as imposing a new burden, the private rights affected are subject to condemnation if provision is made for it by statute, otherwise consent of the land-owners must be obtained.

§ 163. **Condemnation for electric railway**—**Taking one railroad for the use of another railroad.**—The general rule is that land already devoted to one public use cannot be taken for another, under a general law, where the effect would be to destroy the franchise;² and power is not ordinarily given to one railroad company to condemn the right of way of another except for the purpose of crossing, and such power is never given by implication. It is quite feasible, however, for two street railway companies to make use of the same track, and it is not unusual to give one street railway company the right to make use of the tracks of another upon certain conditions, and provision is made in some states for proceedings to condemn such a right. Under such a statute in Ohio it has been held that such proceedings may be taken and compensation made, but that the appropriating company does not acquire a joint ownership of the road so as to entitle it to compensation

¹ Under the English electric lighting act of 1882 it has been held that the compensation required to be made under section 17 is for damages caused by the construction of the works, and not those caused by the use of them. *Shelfer v. London Electric Lighting Co.*, App.Cas. [1895], 1 Ch. 287.

In Pennsylvania it has been held that since the act of May 8, 1889, in-

vesting electric-light companies and companies of like nature with the right of eminent domain, does not provide the mode of assessing damages, the proper proceeding is a special action on the case. *Zanziger v. Wayne Electric Light Co.*, 6 Pa. Dist. Rep. 597.

² *Northwestern Tel. Exch. v. Chicago, M. & St. P. Ry. Co.* (Minn., 1899), 79 N. W. Rep. 315.

from a third company to which the owner grants a like privilege.¹

A statute in Utah (passed before electric railways were known) declares that property appropriated for public use may be taken in the exercise of eminent domain in behalf of "steam and horse railroads," but that such property shall not be taken unless for a more necessary use than that to which it has been already appropriated, and provision is made for crossing and for limited use of the same tracks in common with the owner, and it has been held that electric railways are included within the meaning of the phrase "steam and horse railroads," and that they are entitled to exercise the right of eminent domain.²

In Missouri it was held that an electric railway company may condemn the privilege of using the tracks of a cable railway, and that in estimating the damages the cost of the cable conduit should be considered, although it cannot be used by the electric railway company, and the construction of it made the cost of the cable road much greater than that of an electric railway.³

§ 164. The same — Crossing railroads — Condemnation and regulation.— The crossing of railroads is essential to the value of almost all franchises for extending electric wires along highways, and it may be safely said that there is always implied, if not express, power to condemn such right of crossing, if any condemnation be necessary. Whether any right of property is taken by the act of crossing will depend very much on the question whether the use of the highway for the electric wire is anything more than the ordinary and proper use of the road to which the railroad is bound to submit. If this be so, permission to use the highway involves the right to cross the railroad, and no right of property is taken and no legal injury inflicted. It is nevertheless true that more or less inconvenience and danger are involved in the crossing of a railroad by any line of electric wire, and especially by the electric railway, and there is often a necessity for the use of appliances in common and for

¹ Ohio Rev. Stat., § 3438, 1880; Rev. Stat., pt. 3, tit. 2, ch. 8; Toledo Consol. St. Ry. Co. v. Toledo Electric St. Ry. Co., 50 Ohio St. 603, 36 N. E. Rep. 312.

² Ogden City Ry. Co. v. Ogden City, 7 Utah, 207, 26 Pac. Rep. 288, 3 Am. El. Cas. 321 (1891).

³ Grand Ave. Ry. Co. v. People's Ry. Co., 132 Mo. 34, 33 S. W. Rep. 472.

concurrence in taking precautions against dangers; and where there are statutes regulating the crossing of railroads at grades, and giving power to the courts or to other officers with regard to the same, these provisions have been declared to be applicable to crossings made by electric railways,¹ and the court of equity in granting injunctions against interference with crossings has imposed terms by which provision is made for payment for the privilege of crossing, or as to the joint use of appliances or the precautions to be taken on both sides.²

§ 165. *The same — Regulations in New Jersey.*—In New Jersey a statute provides that whenever the route of any steam or electric railroad hereafter to be constructed shall cross, at points outside of the limits of cities, the line of any steam railroad in the state, such crossing shall be made in such a way as will inflict the least injury upon the rights of the company owning the line to be crossed, and that it shall be the duty of the chancellor, upon application and on notice, to define by his decree the mode in which such crossing shall be made. The chancellor, upon an application made to him in such a case,³ held that he had no power to change the route of the electric railway sanctioned by municipal ordinance, and finding overhead and underneath crossings impracticable because of the great expense, he directed the establishment of the "Gibbs Signal System" and the construction of a signal tower by the electric railway company, the signals to be operated and controlled by the steam railroad company at the expense of the other company. The operation of the system was to cut off the electric power and derail the car on the approach of a train on the other line. The court of errors held that the act giving the chancellor power to define the mode in which the crossing should be made did not warrant him in imposing upon the steam railroad the duty of operating the electric railway in any particular, and the decree was reversed.⁴ The court said they would not decide whether the legislature had power to impose

¹ *Pennsylvania R. R. Co. v. Brad-*
dock Elec. Ry. Co., 152 Pa. St. 116;
Orange Crosstown & P. V. R. R. Co.
v. New York, G. L. & W. R. R. Co.,
10 N. J. L. Journ. 301.

² *Orange Crosstown, etc. R. R. Co.*

v. New York, G. L. & W. R. R. Co.,
10 N. J. L. Journ. 301.

³ *N. Y. & Long Branch R. R. Co. v.*
Atlantic Highlands, etc. Ry. Co., 55
N. J. Eq. 522 (1897).

⁴ *Ibid.*, p. 529.

upon the steam railroad company the duty of taking unusual precautions without providing for compensation to be made for the additional expense.¹

In a later case the chancellor² held that under this statute the chancellor's direction as to the "mode and manner" of crossing could not give authority for a change of grade of the street so as to relieve the company from responsibility for damages to the land-owner. The crossing must be made, he said, according to the chancellor's prescription, and in no other way, but authority to change the grade of the street must be obtained from the municipality having power to confer it, and if such authority cannot be obtained the railroad company will be responsible for consequential damages to the land-owner. In view of this the chancellor held that an undergrade crossing in the case before him was not reasonably practicable, and he gave directions for the use of signals and derailing contrivances on a crossing at grade.

§ 166. The same — Cases in Pennsylvania.—A statute in Pennsylvania³ relating to legal proceedings for the crossing of one railroad by another makes it the duty of courts of equity to ascertain and define the mode of such crossing which will inflict the least practicable injury upon the rights of the company owning the road intended to be crossed, and declares that if, in the judgment of the court, "it is reasonably practicable to avoid a grade crossing, they shall by their process prevent a crossing at grade." The supreme court has held that this statute applies to an electric railroad seeking to cross at grade the tracks of a steam railroad, and is a proper exercise of the police power; and that in view of the inherent danger of crossing a railroad with an electric car, and of the peculiar dangers of

¹ In an earlier case, where the point of crossing was within the limits of a city, and the statute did not apply, an electric railway company asked for an injunction against the interference with their crossing of a steam railroad, and Vice-Chancellor Pitney required them to pay one-third of the expense of an interlocking switch and derailing system. *Consol. Traction Co. v. Watchung R. R. Co.* (N. J. Chy. August 9, 1895, not reported).

As to the power of the court of chancery under this statute to control the construction and operation of the crossing, and the notice to be given, see *Consolidated Traction Co. v. South Orange & M. Traction Co.*, 56 N. J. Eq. 569, 40 Atl. Rep. 15 (1898).

² *In re Saddle River Traction Co.*, 41 Atl. Rep. 107 (N. J. Eq., 1898).

³ Act of June 19, 1871, § 2; *Brightly's Furdon's Digest*, p. 1785.

the particular crossing, an injunction should be granted against crossing at grade where it appeared that an overhead viaduct was practicable, and could be built for \$7,000. This decision has been approved and followed by the supreme court in later cases. In one of these¹ it was shown that the expense of avoiding a grade crossing would amount to at least \$150,000, but the court said that since it appeared that an overhead crossing was not physically impracticable they were required by the statute to prevent a grade crossing, except in case of "imperious necessity," and that since the complainant had already two grade crossings, no such necessity existed, even though these two crossings were not sufficient for the increasing travel.

In the other cases² the court held that it was not a sufficient reason for refusing an injunction against a grade crossing that a change of grade might involve the payment of damages to the abutting land-owners, and that the electric railway had, under the statute, no power to condemn.

In a recent case in the common pleas, however, it was held that a street railway has *prima facie* the right to cross the tracks of a railroad at grade, and that it is for the party objecting to the crossing to furnish the court with the facts that show it to be reasonably practicable to avoid it; and in this case the court called attention to the fact that a steam railroad company holds its right of way subject to the use of the public streets at the crossings by street railway cars as well as other vehicles.³

§ 167. The same — Cases in New York.— The statute in New York provides that every railroad corporation whose

¹ Chester Traction Co. v. Phila., W. & B. R. R. Co., 188 Pa. St. 105, 41 Atl. Rep. 449 (1898). See, however, Buffalo R. & P. Ry. Co. v. Du Bois Traction Co., 149 Pa. St. 1, 24 Atl. Rep. 79.

² Del. & H. Canal Co. v. Scranton & P. Traction Co., 180 Pa. St. 626, 37 Atl. Rep. 780; Penn. R. R. Co. v. Warren St. Ry. Co., 189 Pa. St. 74, 41 Atl. Rep. 331; N. Y. Cent. & H. R. R. Co. v. Warren St. Ry. Co., 188 Pa. St. 85, 41 Atl. Rep. 333.

³ Williams Val. Ry. Co. v. Lykens & W. Val. St. Ry. Co., 1 Dauph. Co. Rep. 225. See also, on this last point, Penn. R. R. Co. v. Greensburg, J. & P. St. Ry. Co., 176 Pa. St. 559, 35 Atl. Rep. 122; Morris & Essex R. R. Co. v. Newark Pass. Ry. Co., 51 N. J. Eq. 379, affirmed 52 N. J. Eq. 340; West Jersey R. R. Co. v. Camden, G. & W. Ry. Co., 52 N. J. Eq. 31, 29 Atl. Rep. 423; N. Y. & G. L. Ry. Co. v. N. J. Electric Ry. Co., 60 N. J. L. 52. In this case there is a discussion of the liability of either railroad company for damages in case of a collision, and the duties of each as to taking precautions.

road shall be intersected by a new railroad shall unite with the corporation owning the new railroad in forming the necessary intersection; and that, on failure to agree, commissioners shall be appointed with power to determine whether the crossing shall be beneath or at or above the existing grade.¹ It has been held that this applies to a crossing to be made by an electric railroad, and that on failure to come to an agreement the company must apply, under the act, for the appointment of commissioners.² This decision was affirmed,³ and the court of appeals said that it was for the electric railway company to show that it had acquired the right to cross the other line at grade; and, having failed to do so, it was not entitled to an injunction. In this case the electric railway company was using the tracks of an old horse-car line, and only asked for the removal of a chain which prevented the passage of the trolley-pole. The decision is based on the New York statute imposing certain conditions on the right to cross at grade. In another case under the same statute it was held that no action can be maintained for the appointment of commissioners to determine the manner of crossing unless the company has obtained the consent of the local authorities and of the requisite number of property owners to the construction of the line upon the highway.⁴

§ 168. **The same—Decision in Massachusetts.**—The statute in Massachusetts⁵ declares that “a street railway company whose track crosses the tracks of a steam railroad shall make the crossing in such manner as to injure as little as possible such tracks, and shall not insert frogs therein without the consent of the directors of such road.” The driver of a car is required to stop it before crossing, and the supreme judicial court is given full equity powers to compel the observance of all laws governing street railroads and all lawful regulations of the municipal authorities or railroad commissioners. The court has held that under these statutes it has no power to impose conditions not imposed by the legislature or the municipality,

¹ Laws 1890, ch. 565, § 12.

³ 144 N. Y. 445, 39 N. E. Rep. 392

² Port Richmond & P. P. Elect. (1895).

Ry. Co. v. Staten Island Rapid Transit Ry. Co., 71 Hun, 79, 24 N. Y. Supp. 566 (1893).

⁴ Geneva & W. Ry. Co. v. N. Y. Cent. & H. R. R. Co., 24 App. Div. 335, 48 N. Y. Supp. 842.

⁵ Pub. St., ch. 113, §§ 4, 7, 39, 40, 41.

nor to require a street railway company to put frogs in its tracks and to provide interlocking signals to protect the crossing. The court said: "The whole matter is regulated by the legislature. Our duty is merely to see that the law is complied with, and not to interfere, unless either the constitution or the law requires us to do so."¹

§ 169. Electric railway crossing other railroads — Must compensation be made? — A railroad that is laid across a public street is subject at that point to the ordinary public uses of the street as a highway, and therefore, if the use of a street by an electric railway for carrying passengers is one of the ordinary and proper uses of a public highway, such a railway may be laid without compensation for the use of the land. If there are statutory regulations or conditions, they must be complied with; but a railroad crossing a street is subject to the proper uses of a street, and if the electric railway is such a use, no right of property is affected by making the crossing with the rails and wires, and the existing line may even be required to submit without compensation to the adjustment of its rails and wires to those of the new company. There are special cases of peculiar injury arising out of local conditions, and in such cases compensation for such injuries may be required; but as a general rule, where it is settled that the electric street railway is, like the horse railway,² a proper use of the street for the purposes of public travel and not a new burden upon the land, no compensation for crossing another railroad is required.

§ 170. The same — Cases in New Jersey. — In a case in New Jersey in 1893 the chancellor declined to grant an injunction against the crossing of a steam railroad by an electric railway

¹ Old Colony R. R. Co. v. Rockland & A. St. Ry. Co., 161 Mass. 416, 37 Atl. Rep. 370 (1894).

² Horse railroads are a proper use of the street and impose no new burden. See ch. X, § 119, *supra*, and cases cited. As to the crossing of steam railroads by horse railroads, see Brooklyn Cent. & J. R. R. Co. v. Brooklyn City Ry. Co., 33 Barb. (N. Y.) 420; New York & Harlem R. R. Co. v. Forty-Second, etc. R. R. Co., 50 Barb. (N. Y.) 309; Market St. Ry. Co. v. Central R. R. Co., 51 Cal. 583; High-

land Ave. & B. Ry. Co. v. Birmingham Union Ry. Co., 93 Ala. 505, 9 S. E. Rep. 568; Chicago & C. Terminal Ry. Co. v. Whiting, H. & E. C. St. Ry. Co., 139 Ind. 297, 38 N. E. Rep. 604. As to steam railroads crossing each other in the streets, see Kansas City, St. J. & C. B. R. R. Co. v. St. Joseph Terminal Ry. Co., 97 Mo. 457, 10 S. W. Rep. 826. Cable and horse railway: Omaha Horse Ry. Co. v. Cable Tramway Co. (U. S. C. C., Neb.), 33 Fed. Rep. 727.

authorized to be laid in a public street, saying the general consensus of judicial opinion was that the electric railway was a proper use of the street, imposing no new burden, and that at all events the legal right of the steam railroad company was not clear, and therefore it was not entitled to a preliminary injunction.¹ This decision was affirmed by the court of errors,² and in the meantime the chancellor held, in another case,³ that an electric street railway was not an additional burden upon the soil, and that a steam railroad company having its tracks laid across the street was not entitled to compensation for the use of the street at that point for an electric railway, the wires being so suspended as not to interfere with the operation of the steam railroad. In this case, also, it was a question of the right to a preliminary injunction.

These decisions were followed by Vice-Chancellor Emery in the same court in a case relating to the crossing of an electric railway, involving the adjustment of the overhead wires and the joint use of the electric current.⁴ The vice-chancellor held that the system of crossing, although a complicated use, was still, in its essential nature, only a joint use of the public highway at the point of crossing for the sole purpose of crossing, and that the complainant, having itself put up wires in the street, was not entitled to compensation for such use of them by the defendant as was necessary for the purposes of public travel in crossing the complainant's line. The power of the court to regulate the mode of the joint use was referred to as not being involved in the issue presented by the pleadings.

§ 171. *Same—Cases in Illinois and Nebraska.*—The supreme court of Illinois in 1895 held that the use of streets by street cars, whether propelled by horse power or electricity, does not constitute a new burden upon the land, and that a steam railroad company is not entitled to an injunction against the construction of an electric railway in the street across its line in such a manner as not to injure the railroad tracks.⁵

¹ *Morris & Essex R. R. Co. v. New-ark Pass. Ry. Co.*, 51 N. J. Eq. 379, 29 Atl. Rep. 184 (1894).

² 52 N. J. Eq. 340.

³ *West Jersey Ry. Co. v. Camden, G. & W. Ry. Co.*, 53 N. J. Eq. 31, 29 Atl. Rep. 422 (1894).

⁴ *Consol. Traction Co. v. So. Orange & M. Traction Co.*, 56 N. J. Eq. 569, 40 Atl. Rep. 15 (1898).

⁵ *Chicago, B. & Q. R. R. Co. v. West Chicago St. Ry. Co.*, 156 Ill. 255, 40 N. E. Rep. 1008, affirming S. C., 54 Ill. 273. As to the right and duty to put

The supreme court of Nebraska followed this decision in a case in 1896,¹ and held that a steam railroad company having tracks laid across a street at grade is not entitled to compensation for the crossing of its line within the street by an electric street railway. The court said the doctrine of the cases was that a railroad company acquired no exclusive use of the streets crossed by its tracks, but held the right in common with the general public, and must be presumed to have contemplated the adoption of improved means of travel upon the streets, and any new inconvenience suffered by it on account of the crossing was *damnum absque injuria*.

§ 172. The same — Cases in Pennsylvania and Delaware. In Pennsylvania it was held in 1896 that a railroad company, having tracks across a street and having itself paid for the building of a viaduct to carry the highway across the line, was not entitled to an injunction against the use of the viaduct by an electric railway authorized to use the street.²

In a later case³ a distinction was taken between a crossing on a highway and a crossing elsewhere, and the court held that the statute authorizing street railways to cross any other railway did not confer the right of eminent domain, and only gave the right to cross where there is an established highway; and the court said that the steam railroad company would be entitled to compensation for a crossing elsewhere, even though it was on a viaduct passing over the line. An injunction against building such a bridge was granted.⁴

In a case in 1897⁵ Chancellor Nicholson of Delaware quoted the decision of Chancellor McGill of New Jersey above referred to,⁶ and held that since the electric railway was one of the

in a new, improved form of crossing, see *Chicago & C. T. Ry. Co. v. Hammond-Whiting, etc. Ry. Co.*, 151 Ind. 577, 46 N. E. Rep. 999.

¹ *Chicago, B. & Q. R. R. Co. v. Steele, Receiver of Beatrice Rapid Transit & Power Co.*, 47 Neb. 741, 66 N. W. Rep. 830, distinguishing *Calvert v. State*, 24 Neb. 616, 52 N. W. Rep. 687.

² *Pennsylvania R. R. Co. v. Greensburg, J. & P. St. Ry. Co.*, 176 Pa. St. 559, 35 Atl. Rep. 122 (1896).

³ *Northern Central R. R. Co. v. Harrisburg & M. El. Ry. Co.*, 177 Pa. St.

142, 35 Atl. Rep. 624, 34 L. R. A. 573 (1896).

⁴ Injunction refused where the street railway proposed to take all precautions the court thought necessary. *Pennsylvania R. R. Co. v. Suburban Rapid Transit Co.* (Pa. Co. Ct.), 22 Pittsb. L. J. (N. S.) 375.

⁵ *West Jersey Ry. Co. v. Camden, G. & W. Ry. Co.*, 52 N. J. Eq. 31.

⁶ *Philadelphia, W. & B. R. R. Co. v. Wilmington City Ry. Co.*, 38 Atl. Rep. 1037 (Del. Ch., 1897).

proper uses of the street, it could not be excluded from that part of the street which was crossed by a steam railway, and was entitled to lay its rails and to string its wires at a proper height across the track. The Pennsylvania cases were distinguished as resting upon a statute authorizing the court to regulate or prevent level crossings.

§ 173. *The same* — *Cases in Connecticut and Alabama.* — In Connecticut it was decided in 1895¹ that the legislature has the right to authorize an electric street railway to cross a steam railway at grade in the street. The court said it was not called upon to consider whether the electric railway imposed a new burden on the land. The plaintiff had a mere right of crossing, and was not entitled to compensation for any danger or inconvenience arising from an authorized use of the street for the purposes of public travel.

In a later case in the same court² a majority of the judges were of opinion that an electric railway is not a new burden, but Judge Hammersley, with whom the chief justice concurred, protested earnestly against this conclusion, and an injunction against the use of a street by an electric railway company was granted on the ground that its franchise was defective.

Afterwards, in a case involving the crossing of steam railroad tracks under peculiar conditions, Judge Hammersley, reading the opinion of the court, referred to the former cases and said: "The plaintiff (assuming its land to be covered by the public highway) is not entitled to an injunction or compensation for the mere occupation of that land by the tracks of the defendant. There must be some peculiar and special damage done to the property of the plaintiff;" but he held that under the peculiar conditions of the case, and in view of the character of the title of the railroad company,³ it was entitled to an injunction. Two judges dissented.

In a recent case in Alabama, in which two railways used the streets without objection from the municipality, and one of them had authority before the other was built to use electric

¹New York, N. H. & H. R. R. Co. v. Bridgeport Traction Co., 65 Conn. 410, 32 Atl. Rep. 953.

ton Tramway Co., 69 Conn. 146, 36 Atl. Rep. 1107 (1897).

³New York, N. H. & H. R. R. Co. v. Fair Haven & W. R. Co., 70 Conn. 610, 40 Atl. Rep. 607 (1893).

²Canastota Knife Co. v. Newing-

power, it was held that this company was entitled now to string its wires across the tracks of the other without making compensation.¹

§ 174. **Requisites of the petition to condemn.**—The petition must allege the fulfillment of the conditions precedent to the right to exercise the power of condemnation, as, for example, the lawful organization of the company, the consent of the local authorities, the consent of the required number of property owners, and the failure to agree with the petitioner.²

In the case of the condemnation of the rights of abutting owners under a statute requiring a petition for the appointment of commissioners to assess damages, it was held in New Jersey that a petition containing no information as to the size and location of the poles except what was furnished by some small dots on a map of the street, without a scale, was too indefinite.³ The decision was affirmed on appeal on this point (no opinion being expressed on the other), and the court said the petition should indicate the intended height of the poles, the number and size of the cross-arms they will bear, and the number of wires they are to sustain. These particulars, the court said, are necessary in a case of this kind to the ascertainment of the privilege or right of way which is to be secured.⁴

In Texas, under the Revised Statutes of 1895, article 4447, requiring a telegraph company seeking to condemn land for a right of way to state in writing in its application the real estate sought to be condemned, it was held that a description thereof which would enable one skilled in such matters to locate the land sought to be condemned is sufficient.⁵

¹ Birmingham Ry. & Electric Co. v. Birmingham Traction Co. (Ala., 1899), 25 S. Rep. 192.

² See §§ 154, 155, 156 and 157, ch. XI, *supra*, and cases cited. See also Telegraphs on Post Roads, ch. XII, *infra*. See also Chicago & Atchison Bridge Co. v. Pac. Mut. Pac. Teleg. Co., 36 Kan. 113, 2 Am. El. Cas. 279.

³ Broome v. N. Y. & N. J. Teleph. Co., 49 N. J. L. 624.

⁴ New York & New Jersey Telephone Co. v. Broome, 50 N. J. L. 432. See also Winter v. N. Y. & N. J. Telephone Co., 51 N. J. L. 83, on the same

point, and Turnpike Co. v. A. & E. Commercial News Co., 43 N. J. L. 381, with regard to the petition to condemn a right of way along a turnpike.

⁵ Houston & Texas C. Ry. Co. v. Postal Tel. Cable Co. (Tex. Civ. App.), 45 S. W. Rep. 179. See also Gulf, C. & S. F. Ry. Co. v. S. W. Teleg. & Teleph. Co. (Tex. Civ. App.), 45 S. W. Rep. 151 (1898). This case relates to condemnation of land along a railroad, and discusses the requirements of the petition and the question of the notice required by the statute.

In Missouri it has been held that the petitioner need not file a plat of the location of a telegraph line when this would not give a more intelligible statement of the manner of the proposed construction than is given by the petition, and that a judgment in proceedings to condemn the right of way for a telegraph line along a railroad is not void for uncertainty because the petition and judgment describe the line as located as at a distance of not less than twenty-five feet from the outer edge of the railroad track on the east side, or at such points as may be agreed upon.¹ The petition need not locate each pole nor state how many wires are to be strung upon the cross-arms, and the petition may show by its description that the location of the telegraph line will not incommode the public use of the land for a railroad.² In such a petition a stipulation that if ever the railroad company desires to change the location of its tracks, or lay new ones, the telegraph company will remove the poles to the new right of way is binding on the petitioner, and so affects the question of damages.³

In Alabama it was held that a petition for the condemnation of a right of way for a telegraph line over the right of way of a railroad need not designate the exact position of the poles, nor which side of the track is to be used, nor the quantity and specific description of the land to be taken, nor that existing lines will not be displaced, and that the petition was sufficient when it stated that the poles would be placed thirty feet from the outside of the track, and one hundred and seventy-five feet apart, and at such places as should be agreed upon.⁴ And in the federal court it has been held that in such a petition it is not necessary to state by what tenure the railroad company holds its lands.⁵

¹ *St. Louis & C. R. R. Co. v. Postal Telegr. Co.*, 173 Ill. 503, 51 N. E. Rep. 382 (1898).

² *Ibid.*

³ *Ibid.*

⁴ *Mobile & O. Ry. Co. v. Postal Telegr. Cable Co.*, 24 S. Rep. 408 (Ala., 1898).

⁵ *Postal Telegr. Cable Co. v. Southern Ry. Co.*, 89 Fed. Rep. 190 (1898).

CHAPTER XII.

TELEGRAPHS ON POST ROADS.

§ 175. Occasion and purposes of the act of congress of July 24, 1866, concerning telegraphs on post roads.—The telegraph was found during the civil war to be of supreme importance as an agency of the government; and when the unity of the United States had been established by the result of the war, the importance of binding the whole country together by means of the telegraph and the railroad was the more fully appreciated. The government had already in the midst of the war provided for a railroad and a telegraph to extend from the Mississippi to the Pacific, under the authority and control of the United States. In pursuance of the wise policy by which this great work was undertaken, and making use of the power to regulate commerce between the states and to maintain post roads, congress enacted a law, in 1866, giving telegraph companies the right to extend their lines over the public domain, and over all military or post roads in the United States. This act was approved July 24, 1866, and is entitled “An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes.”¹ It declares that any telegraph company organized under the laws of any of the states of the Union shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, and over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, but that such lines of telegraph shall be so constructed and maintained as not to interfere with ordinary travel; and it is provided that before any telegraph company shall exercise any of the powers or privileges conferred by the act, the company shall file their written acceptance with the postmaster-general of the restrictions and obligations required by law.

¹ 14 U. S. Stat., 221, U. S. Rev. Stat., §§ 5263, 5263.

§ 176. **Decision of the supreme court sustaining and construing the act.**—The act came before the supreme court of the United States in 1877, and was broadly sustained, and was so construed as to give it the fullest effect for the purpose of maintaining the freest intercourse between the states, and preventing any interference with the telegraph by state governments or by corporations or individuals.

The case was *Pensacola Telegraph Co. v. Western Union Telegraph Co.*,¹ on appeal from the decision of Judge Woods, in the United States circuit court for the district of Florida.²

An act of the legislature of Florida purported to give the complainant the exclusive right to erect telegraph lines in certain counties of the state, and Judge Woods held that, so far as the act purported to give to any company the exclusive privilege of using a post road, it was in conflict with the act of congress, and therefore void. This decision was sustained by the supreme court.³

§ 177. **What the term "post roads" includes.**—The act is not confined to the public domain and to military and post roads belonging to the United States,⁴ but extends to all post roads, and applies to public highways opened under the laws of the several states and territories upon which the mails are carried.⁵

By a subsequent statute (1872, Rev. Stat. U. S., § 3964), all railroads and all letter-carrier routes in any city or town were expressly declared to be post roads, and by the act of March 1, 1884 (23 U. S. Stat. 3), all public roads and highways were declared to be post routes, and since the decision of the supreme court in the case of the Pensacola Telegraph Company there has been no question that the act of July 24, 1866, applies generally to all public highways of every kind over which the

¹ 96 U. S. 1, 1 Am. El. Cas. 250.

² Woods C. C. 643 (1875).

³ The act of congress does not apply to telephone companies. *Richmond v. Southern Bell Teleph. & Teleg. Co.*, 174 U. S. 761 (1899), reversing S. C., 85 Fed. Rep. 19.

⁴ Although it was so held in an early case in Pennsylvania. *Philadelphia v. W. U. Teleg. Co.*, 2 Wkly. N. C. 455, 33 Leg. Intel. 129.

⁵ *Pensacola Teleg. Co. v. Western Union Teleg. Co.*, 96 U. S. 1, 1 Am. Elec. Cas. 250; *So. Bell Teleph. & Teleg. Co. v. Richmond*, U. S. C. C. E. D. Va., 78 Fed. Rep. 858, 6 Am. El. Cas. 1 (1897); S. C. on appeal, 85 Fed. Rep. 19 (1898), 174 U. S. 761; *Postal Teleg. Cable Co. v. Baltimore*, 79 Md. 502, 5 Am. El. Cas. 37 (1894); *St. Louis v. W. U. Teleg. Co.*, 148 U. S. 92, 4 Am. El. Cas. 102.

mails are carried, or which are declared by congress to be post roads.

§ 178. **The scope and effect of the act as declared by the supreme court — Equal privileges secured to all telegraph companies.**— The purpose of the act as declared by the supreme court in that case, and generally recognized ever since, was to facilitate communication by telegraph throughout the country, and to prevent restriction upon this kind of interstate commerce by the states or individuals. Chief Justice Waite, delivering the opinion of the court in that case, said:

“The statute of July 24, 1866, in effect, amounts to a prohibition of all state monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by congress, and that corporations organized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege.

“To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the states, and is appropriate legislation to carry into execution the powers of congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner, and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.”

The act, therefore, provides that all post roads shall be kept open for the use of all telegraph companies that shall accept the terms of the act, and prohibits interference with this privilege by state legislation, or by the action of individuals. A state legislature cannot give to any one telegraph company an exclusive right to use a post road for a telegraph line.¹

¹ *Pensacola Telegr. Co. v. Western Union Telegr. Co. v. B. & O. Telegr. & Union Telegr. Co.*, 96 U. S. 1, 1 Am. R. R. Co., 19 Fed. Rep. 660 (1884), 23 El. Cas. 250, 2 Woods C. C. 463; *West. Fed. Rep.* 133; *West. Union Telegr.*

§ 179. Railroad and turnpike companies cannot give exclusive rights to use their rights of way for telegraph purposes.—As this is true of the state with respect to all post roads, so also it is true of the corporations or individuals owning the right of way of a turnpike or a railroad. Neither a railroad nor a turnpike company can give a telegraph company an exclusive right to use its road which shall be of any avail against a company which has accepted the provisions of the act of congress. In *Western Union Telegraph Co. v. American Union Telegraph Co.*,¹ it was held that a railroad company cannot grant to a telegraph company the sole right to construct a line over its right of way, so as to exclude other companies which have complied with the act of congress and which do not interfere with the use of its line of railroad; and it was held that the railroad company having given its assent to the new line of telegraph, the company owning the old line was not entitled to an injunction, even though it had an agreement with the railroad company for the exclusive use.

In *Western Union Telegraph Co. v. Burlington & South Western Railway Co.*,² the court said it is not competent for a railroad company to grant a telegraph company the exclusive right to establish its lines of telegraph along its right of way, such contracts being in restraint of trade and contrary to public policy, and the court referred to the statute and cited the decision of the supreme court and other cases.

So also in *Western Union Telegraph Co. v. B. & O. Telegraph Co. v. Am. Union Teleg. Co.*, 9 Biss. 72, 1 Am. El. Cas. 288 (1879); *W. U. Teleg. Co. v. Burlington & S. Ry. Co.*, 11 Fed. Rep. 1; *West. Union Teleg. Co. v. Am. Union Teleg. Co.*, 65 Ga. 160, 38 Am. Rep. 781.

Since the passage of the act of congress of July 24, 1866, it is, of course, impossible for a state to grant an exclusive right to any one company to construct a line of telegraph between any two points connected by post roads. There is, however, an interesting decision in California, made in 1863, sustaining, on grounds of public policy, the validity of a very broad grant of an exclusive privilege

of building and operating a line of telegraph from San Francisco to Marysville, by way of San José, Stockton and Sacramento City, for fifteen years. It was the grant made to Allen & Burnham on May 3, 1852. *California St. Teleg. Co. v. Alta Teleg. Co.*, 22 Cal. 398 (1863).

¹ 9 Biss. 72, 7th Circuit, 1879, Harlan, J., 1 Am. El. Cas. 288.

² 11 Fed. Rep. 1, 3 McCrary, 130, 1 Am. El. Cas. 402. To the same effect, *Union Trust Co. of N. Y. v. Atchison, T. & K. Ry. Co.*, 8 New Mexico, 327, 43 Pac. Rep. 701; *U. S. Circuit Court D. Iowa* (1882).

Co.,¹ the court said that a railroad is, under the statute, a post road, and therefore the act of congress of July 24, 1866, giving to all telegraph companies alike the right to construct and operate lines along all post roads of the United States, is paramount over any agreement made by a railroad company securing a telegraph company the exclusive use of the line for its wires.

§ 180. **Contracts for exclusive right for telegraph line void on grounds of public policy.**—There are other cases in which the same rule is maintained in which the decision is based also upon the principle that such exclusive contracts tend to stifle competition and are contrary to public policy, without regard to the federal statute.

It was so held in a case in Georgia, in which the contract had been made before the passage of the act of July 24, 1866, but the court referred to section 2750 of the code of Georgia, relating to monopolies.²

So also in *Gilbert's Case*,³ it was held by the New York court of appeals that, a telegraph being a public use, a railroad company could not make an exclusive contract with a telegraph company so as to prevent another company from obtaining a right of way over the railroad in such a manner as not to interfere with travel; and a similar decision was made in Alabama in 1875.⁴

In Georgia it was suggested that a contract for exclusive use was beyond the power of the railroad company, because it had condemned the land only for railroad purposes, and these did not include exclusive rights for telegraph purposes against the public interest.⁵

¹ 19 Fed. Rep. 660, 1 Am. El. Cas. 623; U. S. Circuit Court S. D. New York, Wallace, J. (1884).

In *Telegraph Co. v. Telegraph Co.*, 10 Cin. Week. Bull. 201, it was held that an agreement between a railroad company and a telegraph company giving exclusive right of way for the construction of its line does not concern the duty of railroad companies to observe equality; but a contract to deliver material anywhere along the line for one company and not to deliver for others,

except at stations, is contrary to the duty of common carriers, and void as against public policy.

² *Western Union Tele. Co. v. American Union Tele. Co.*, 65 Ga. 160, 1 Am. El. Cas. 306 (1880).

³ 70 N. Y. 361.

⁴ *New Orleans, Mobile & Texas R. Co. v. South. & Atl. Tele. Co.*, 53 Ala. 211.

⁵ *South Western R. R. Co. v. Southern & Atlantic Tele. Co.*, 46 Ga. 43, 12 Am. Rep. 585 (1872).

So also in a case in the United States circuit court for the western district of Missouri,¹ in which the contract was made before the passage of the act of July 24, 1866, the court held that an exclusive contract was invalid in that it took away the state's right of eminent domain. The railroad company in giving an exclusive right seek to add an unlimited franchise to one that is itself limited, and this they are powerless to do. The contract was also held to be *ultra vires*. Whether it was affected by the act of 1866, passed afterwards, was not decided. In another case in the same circuit,² Judge McCrary, while granting an injunction against an ejectment before a suit brought to declare the contract void, said: "I have little doubt that the clause here referred to is void." It was the case of a railroad company agreeing with a telegraph company for the construction of a line, and to give it the exclusive use of it for commercial and general business, the telegraph company to transact the telegraph business of the railroad company. Mr. Justice Woods, in a case in the seventh circuit, in 1885,³ referred to the doctrine as "now well established that an exclusive privilege to do telegraphing upon or along any railroad company cannot be given to any person or corporation." It was held otherwise, however, in an earlier case in Illinois.⁴

§ 181. **Modifications and exceptions.**—There is a limit, however, to be placed on the general language of this proposition, whether it be an expression of general policy or the interpretation of a statute. There can be no reasonable doubt that such exclusive contract as is necessary to the proper operation of the lines and of the railroad is permissible, and that the pro-

¹ *Western Union Teleg. Co. v. Central Union Co.*, 3 Fed. Rep. 417.

² *Western Union Teleg. Co. v. St. Joseph & W. R. R. Co.*, 1 McCrary, 569, 3 Fed. Rep. 430.

³ *Western Union Teleg. Co. v. B. & O. Teleg. Co.*, 23 Fed. Rep. 12, 1 Am. El. Cas. 721. See also *B. & O. Teleg. Co. v. Western Union Teleg. Co.*, 24 Fed. Rep. 319, 1 Am. El. Cas. 677. A similar decision was made in the United States circuit court in Texas with regard to telegraph companies upon a statute declaring that no corporation should contract with a land-

owner for the exclusive use of his land. *Western Union Teleg. Co. v. B. & O. Teleg. Co.*, 22 Fed. Rep. 133, 1 Am. El. Cas. 601 (1884), Sabin, J.; Texas Rev. Stat., art. 624.

⁴ *Western Union Teleg. Co. v. Chicago, etc. R. R. Co.*, 86 Ill. 246 (1879). See also *Latrobe v. Western Union Teleg. Co.*, 74 Md. 232 (1891); *Postal Teleg. & Cable Co. v. Norfolk & West. R. R. Co.*, 88 Va. 920; *Western Union Teleg. Co. v. Marietta & Conn. R. R. Co.*, 38 Ohio St. 24; *Union Pac. R. R. Co. v. United States*, 50 Fed. Rep. 813.

hibition is only against exclusive privileges for the purpose of shutting out rival lines.¹

It has been held, also, that in a contract between a railroad company and a telegraph company, a restriction binding the railroad company not to construct another telegraph line along its right of way is not void as against public policy, because, if the needs of the public should demand another line, it could be constructed along another railroad or along public highways, or even on land condemned for the purpose.²

§ 182. Practical difficulties — Question of the interference of one line with the other.— There may be practical difficulties in allowing several telegraph companies to use the same railroad for their lines, for the reason that the use by one, or at all events by more than one, may interfere with the full and efficient use of the right of way by another. A telegraph line can often be economically operated only in connection with the use of it by the railroad company itself, and this use is certainly not what is contemplated by the statute. And again, there may be facilities at the railroad stations for the use of but one line, and these can hardly be within the scope of the statute. It may even be that several distinct lines of wire could not be operated without interfering with one another along the narrow strip of land available for them, and the cases do not go so far as to hold that any company has a right to construct a line so as to interfere with the proper working of an existing line. The same principle would no doubt apply to this as has

¹ See § 182, *infra*, and cases cited.

² *West. Union Teleg. Co. v. Atl. & Pac. Teleg. Co.*, 7 Biss. 367.

In *B. & O. Teleg. Co. v. Morgan's La. & Tex. Teleg. Co.*, 37 La. Ann. 833, there were proceedings to condemn the right of way of a railroad for a telegraph, and it was held that an existing telegraph line could only intervene and seek to exclude the new company on the theory that it had an exclusive right of way under a contract with the railroad company. Whether such a contract would be valid to give an exclusive right was not decided, because an exclusive right was not claimed, and it

was found that no damage could result.

In *Marietta & Cincinnati Ry. Co. v. West. Union Teleg. Co.*, 38 Ohio St. 24, 2 Ohio W. L. Bull. 152, it was held that the grant in question was not exclusive, but that the railroad company might maintain a line for its own use, or allow a telegraph company to use it for general business, although it had granted another telegraph company the right to place wires on its poles, and establish stations and do business with points off the line of the road, reserving the right to do local business. S. C., 2 Bull. 74, reversed.

been applied to the use of the right of way itself, namely, that the statute does not give the right to injure property without compensation. The question of interference between different telegraph lines does not seem to have been much discussed by the courts,¹ and we can only apply the principles on which the lines are allowed to be erected on the right of way of the railroad companies.

§ 183. The rights conferred are public and not private rights—The latter can only be taken by consent.—The effect of the statute, according to the decisions of the courts, is to authorize telegraph companies to use public highways of every kind over which the mails are carried or which are declared by law to be post roads; and so far as these roads are public highways for the transportation of the mails, they are subject to be used for telegraph purposes, and for all companies alike, whether chartered by a state or the United States, subject only to the proviso that the line of telegraph shall be so constructed and maintained as not to interfere with ordinary travel.² But the statute does not affect private rights, nor give the power to take or injure private property without compensation. So far as there is a public right of passage, the way is open to the use of the telegraph companies, but so far as there is private property, this must be acquired by consent or by condemnation.

The act of congress does not provide for condemnation. It has no reference whatever to private rights, except so far as to provide that exclusive privileges must not be granted, but that if a right of way is given it shall not confer an exclusive right

¹In *Western Union Teleg. Co. v. American Union Teleg. Co.*, 9 Biss. 73 (1879), the court, in laying down the rule that a right of way could not be given to one company so as to exclude others, limited these others to such as had accepted the provisions of the act of 1866, and whose lines, when constructed and put in operation, would not disturb the possession or materially obstruct the operation of the lines of that company.

In *West. Union Teleg. Co. v. A. & P. Teleg. Co.*, 7 Biss. 367, proceedings

in a state court by a telegraph company to condemn the right of way of another telegraph company over a railroad, while the railroad was in the hands of a receiver, were held to be inoperative and void.

²U. S. Rev. Stat., § 5262. As to interference with electric-light wires in city streets, see *Croswell on Electricity*, p. 194; *West. Union Teleg. Co. v. Los Angeles*, U. S. C. C. S. D. Cal., 76 Fed. Rep. 178, 6 Am. El. Cas. 203 (1896); *Bell Teleph. Co. v. Richmond*, 78 Fed. Rep. 858, 174 U. S. 761.

to the use of the public highway, whether it be a road, a turnpike or a railway.

In the case of the Pensacola Telegraph Co., above referred to,¹ the chief justice of the supreme court said: The act "gives no foreign corporation the right to enter upon private property without the consent of the owner, and erect the necessary structures for its business; but it does provide that whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."²

§ 184. The same — The act of congress gives no power to condemn.— In *Atlantic & Pacific Telegraph Co. v. Chicago, R. I. & P. R. R. Co.*,³ in the United States circuit court, Drummond, J., said: "The rights of a railroad company over its roadway are different from those of the public over a highway. Over the latter any one has a right to travel, subject only to tolls, but the railroad company has exclusive possession of its own cars, etc.

"The construction of the telegraph line involves the actual taking of the property of the company, and congress has no power to authorize this to be done without making compensation." And with this Mr. Justice Harlan agreed in a later case in the same circuit.⁴

So also in a case in Tennessee,⁵ in which a New York telegraph company applied for leave to condemn a right of way along a railroad in Tennessee, it was held that the grant of the privilege to condemn rests wholly with the state; that the laws of Tennessee confer no privileges on any corporation except such as are organized in that state; that the United States statutes confer no power on foreign corporations; and that section 5263 of the Revised Statutes gives only the federal permission to telegraph companies to use railroads, and that they must first acquire a right of way by purchase.

¹ *Pensacola Telegr. Co. v. West. Union Telegr. Co.*, 96 U. S. 1. *Telegr. Co.*, 36 Kan. 118, 2 Am. El. Cas. 279.

² Before a bridge can be condemned for the use of a telegraph the company must file with the postmaster-general its acceptance of the provisions of the act of congress. *Chicago Atchison Bridge Co. v. Pac. Mut.*

³ 6 Biss. 158.

⁴ *West. Union Telegr. Co. v. Am. Union Telegr. Co.*, 9 Biss. 72 (1879), 1 Am. El. Cas. 288.

⁵ 5 *Cincinnati Week. Bull. & O. L. J.* 858; 28 *Myer's Fed. Dec.*, § 31.

Judge Wallace, in a case in the United States circuit court for the southern district of New York,¹ referring to *Pensacola Telegraph Co. v. Western Union Telegraph Co.*,² said: "It was not held in that case that a telegraph company could acquire a right of way over a railroad without the consent of the owner, or even that the act gave to telegraph companies the power to acquire such rights of way by compulsory proceedings upon due compensation, and the contrary was plainly intimated; but the act was considered and expounded as intended and effectual to deny to any one telegraph company the right to acquire any such easement in the lands of a railroad for telegraph facilities as would exclude other companies from obtaining like privileges, and as a declaration by congress of a policy in the interests of the public and of the government, which was reasonable and lawful." A similar view of the statute was expressed by the supreme court of the United States in a later case, and Mr. Justice Miller referred to the statute as a permissive statute, which did not have the effect of exempting a telegraph company from taxation by the state.³

In a case in Louisiana,⁴ where the statute of the state made provision for condemnation and the payment of damages,⁵ the court held that the right acquired under this act, as well as under the act of congress, was not the fee, but only an easement, and that this easement was merely the right to maintain the line in such a manner as not to interfere with the ordinary travel upon the post road, whether highway or railroad. There was no intention to abridge the rights of the railroad company, and the occupation by the telegraph was subject to the right to use the land for railroad purposes; the damages, therefore, were to be assessed merely on the basis of use and occupation.

¹ *West. Union Teleg. Co. v. B. & O. Teleg. Co.*, 19 Fed. Rep. 660, 1 Am. El. Cas. 623 (1884).

² 96 U. S. 1.

³ *Western Union Teleg. Co. v. Massachusetts*, 125 U. S. 530 (1887).

See also *S. W. R. R. Co. v. Southern & Atl. Teleg. Co.*, 46 Ga. 43, 12 Am. Rep. 585 (1872); *Western Union Teleg. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159 (1878); *Northwestern*

Teleph. Exch. Co. v. Chicago, M. & St. P. Ry. Co., 79 N. W. Rep. 315 (Minn., 1899); *Western Union Teleg. Co. v. Ann Arbor Ry. Co.*, 90 Fed. Rep. 379; *Richmond v. Southern Bell Teleph. Co.*, 174 U. S. 761 (1899).

⁴ *Postal Cable Tel. Co. of La. v. La. Western R. R. Co.*, 49 La. Ann. 1270, 22 S. Rep. 219.

⁵ Rev. Civ. Code of La., art. 2632.

§ 185. Is a telegraph line a new burden upon the land taken for a railroad?—When land is condemned for the purpose of a railroad track, it is ordinarily only the right of way for railroad purposes that is taken; and the question has arisen whether the same land may be used with the consent of the railroad company for the purposes of a line of telegraph intended for general business.

Railroads are in a certain sense public highways, and the use for which they appropriate lands is a highway use.¹ Whether a telegraph is an additional burden may depend, therefore, on the question whether such a use is within the highway use for which the land was taken. A telegraph line has been held by some courts to be a proper use of an ordinary street or highway,² and in other courts it has been held to be a new use and an additional burden.³ Although a railroad is a public highway it is not open to the public for general use, but only for use in a certain way. The land is condemned by a certain corporation for the purpose of transportation by means of engines and cars on a railroad track. The use of the land by another corporation, or even by the same corporation for another and different purpose, may well be held to be an additional use for which further compensation should be paid.

Accordingly it has been held that a telegraph company using the right of way of a railroad company for the purpose of general telegraph business must make compensation for the use of the land to the owner of the soil,⁴ but that so far as a telegraph is appurtenant to the railroad, and necessary or convenient to the use of the railroad, the construction of it is consistent with

¹ As to the effect of dedication or condemnation of land for railroad or canal purposes, and the right of adjacency in adjoining owners, see *Barnett v. Johnson*, 15 N. J. Eq. (2 McCart.) 481. See also *Pierce v. Drew*, 136 Mass. 75; *Julia Building Ass'n v. Bell Teleph. Co.*, 88 Mo. 258, and other cases in regard to the telegraph and highways cited in chapter VIII.

² See ch. VIII, §§ 91-96.

³ See ch. VIII, §§ 97-99.

⁴ *A. & P. Teleg. Co. v. C., R. I. & P. R. R. Co.*, 6 Biss. 158; *West. Union Teleg. Co. v. Am. Union Teleg. Co.*, 9 Biss. 72, 1 Am. El. Cas. 288; *Am. Teleg. & Teleph. Co. v. Pearce*, 71 Md. 535, 18 Atl. Rep. 910, 3 Am. El. Cas. 169; *sub nom. A. T. & T. Co. v. Smith*, 1 Am. R. R. & Corp. Rep. 73 (1889).

As to condemnation of rights of private land-owners, see *New Orleans, Mobile & Tex. R. R. Co. v. South. & Atlantic Teleg. Co.*, 53 Ala. 211 (1875). Also cases cited in §§ 183, 184.

the purposes for which the land is taken, and that no further compensation need be made.¹

It has been held in Georgia² that an act authorizing a telegraph company to erect a line upon the right of way of a railroad company without compensation is unconstitutional, and there are many cases in which it is held that a line of telegraph is an additional burden upon the land condemned for the right of way of a railroad, and that compensation must be made to the owner of the soil, even though the telegraph company has complied with the act of congress.³

There is a good deal of difference of opinion on the subject, but where it is so held, then the fact that the railroad is a post road does not relieve the telegraph company of the duty of making compensation. The same rule applies to ordinary highways, and if in fact the erection of a telegraph line along a highway is a new burden upon the soil, compensation must be made to the owner, even though the highway is a post road and the company has complied with the act of congress.⁴

§ 186. Does the statute imply that telegraph is a highway use and not a new burden on the land?—It has, indeed, been suggested that the principle on which the act of congress

¹ West. Union Teleg. Co. v. Rich, 19 Kan. 517, 27 Am. Rep. 159 (1879); State, Duke pros., v. Central N. J. Teleph. Co., 53 N. J. L. J. 341, 349, per Reed, J.

In a case in Indiana in which the charter of the railroad company gave it the land in fee simple, the court held that the company had the right itself, or by contract with another company, to erect the poles and wires necessary to maintain a line of telegraph. The court said that since under the charter the land was held in fee simple, the right to erect poles upon it was a matter of course. Prather v. West. Union Teleg. Co., 89 Ind. 501 (1883).

As to the right of a railroad company having a line of telegraph for its own use to permit a telegraph company to use it for general business, see Marietta & Cinc. R. R. Co. v.

West. Union Teleg. Co., 38 Ohio St. 24.

² Southwestern R. R. Co. v. Southern & Atl. Teleg. Co., 46 Ga. 43, 13 Am. Rep. 585 (1872).

³ Am. Teleg. & Teleph. Co. v. Pearce, 71 Md. 535, 18 Atl. Rep. 910; *sub nom.* A. T. & T. Co. v. Smith, 1 Am. R. R. Corp. Rep. 73 (1889); West. Union Teleg. Co. v. Rich, 19 Kan. 517; Daily v. State of Ohio, 51 Ohio St. 348, 5 Am. El. Cas. 186.

⁴ This appears negatively rather than affirmatively from the decisions, in that when an additional servitude is recognized the statute is not allowed, nor even claimed, to be a justification for not making compensation. See Postal Teleg. Cable Co. v. Baltimore, 79 Md. 502, 5 Am. El. Cas. 37; St. Louis v. W. U. Teleg. Co., 148 U. S. 92, 4 Am. El. Cas. 102. See also ch. III.

was based precludes the idea that the telegraph is a new burden upon the land of a highway. The act assumes that the telegraph is one of the proper uses of the highway, and only another mode of using the public rights therein. It deals only with public rights, and assumes that no private rights are affected by the use of the highway for the telegraph, and it was held in the District of Columbia that the act gave the right to erect lines in the streets of Washington, and that there was no additional burden upon the land for which compensation need be made.¹

On the other hand, the case decided by Judge Drummond and reported in 6 Bissell² was used as an argument on the other side of the question by the dissenting judges in *Pierce v. Drew*³ in Massachusetts.

§ 187. Statutory authority given to telegraph companies with respect to the use of railroad lands is to be construed strictly.—It was held by the court of exchequer in England, in 1854,⁴ that a telegraph line was not authorized by the act of 14 and 15 Vict., ch. 135, to cross under a railway so as to interfere with or damage it. Boring through the ballast under the rails was held to be an interference, and the court said that the power to cross was strictly limited by the terms of the act.

It was held by the supreme court of New York, in 1880,⁵ that the provision of the telegraph act of 1853 (Laws, ch. 471, § 2), authorizing telegraph companies to erect fixtures upon "any of the public roads" of the state, did not apply to the right of way of a railroad company.

§ 188. Telegraphs on post roads are subject to municipal control.—The act of congress has not the effect of putting telegraph companies beyond municipal control with respect to the use of the streets. When the legislature of New York gave authority to commissioners to cause telegraph wires in large cities to be placed underground, Judge Wallace allowed a temporary injunction to stand, so far as the wires strung

¹ *Hewett v. West. Union Teleg. Co.*, 4 Mackey (D. C.), 424 (1886), 2 Am. El. Cas. 222.

² *Atl. & Pac. Teleg. Co. v. Chicago, R. I. & P. R. R. Co.*, 6 Biss. 158.

³ *Pierce v. Drew*, 136 Mass. 75.

⁴ *South Eastern Ry. Co. v. European & American Electric Printing Teleg. Co.*, 9 Exch. 363.

⁵ *New York City & Northern R. R. Co. v. Central Union Teleg. Co.*, 21 Hun, 261, 1 Am. El. Cas. 315.

along the elevated railroads were concerned, on the ground that it was doubtful whether the state statutes could deprive the complainant of the use of a post road;¹ but it was afterwards held by the New York court of appeals that the acts of congress in regard to telegraph companies and post roads did not deprive the state of its control of its highways, and its right to regulate them under the police power, and that the acts providing for the use of post roads are perfectly satisfied by the permission given by the state legislation to put the wires in subways.²

In a later case the supreme court of the United States said: "It is a misconception to suppose that the act of 1866 carries with it the unrestricted right to appropriate the public property of a state. It is, like any other franchise, to be exercised in subordination to public and private rights;" and it was held that a telegraph company which had accepted the provisions of the act was not exempt from the obligation to pay a fixed sum in the nature of a rental to the city of St. Louis.³

§ 189. Telegraphs on post roads are subject to state taxation.—The act of congress does not exempt telegraph companies constructed under it from state taxation. This question arose in a case in the United States supreme court,⁴ and Mr. Justice Miller, referring to the act of July 24, 1866, said:

"This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the federal government carries with it any exemption from the ordinary burdens of taxation. While the state could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of

¹ *Western Union Telegr. Co. v. New York*, 38 Fed. Rep. 552 (1889).

² *American Rapid Telegr. Co. v. Hess*, 125 N. Y. 641, 26 N. E. Rep. 919, 3 Am. El. Cas. 142; *Richmond v. Southern Bell Teleph. & Telegr. Co.* (U. S. C. C. A.), 85 Fed. Rep. 19 (1898); *Richmond v. So. Bell Teleph. Co.*, 174 U. S. 761. See also the discussion of this subject and the cases cited in chapter VI, § 72, *supra*.

³ *St. Louis v. W. U. Telegr. Co.*, 148 U. S. 92, 4 Am. El. Cas. 102. See also *Postal Tel. Cable Co. v. Baltimore*, 79 Md. 502, 5 Am. El. Cas. 37; *Postal Telegr. Cable Co. v. Charleston*, 153 U. S. 692 (1894); *Michigan Tel. Co. v. Charlotte*, 93 Fed. Rep. 11 (1899).

⁴ *Western Union Telegr. Co. v. Massachusetts*, 125 U. S. 530-549, 2 Am. El. Cas. 57.

the laws of the state for the protection of its property and rights is liable to be taxed upon its real or personal property, as any other person would be."

In *Ratterman v. Western Union Telegraph Co.*,¹ the bill alleged that the company had accepted the provisions of the post-roads act, but did not aver that any part of the line was built along a post road, and the supreme court held that a tax upon its receipts which were partly derived from interstate commerce and partly from commerce within the state was not wholly invalid, but only in proportion to the extent that such receipts were derived from interstate commerce.

In *Leloup v. Mobile*, decided at the same term, the defendant pleaded that the telegraph company of which he was manager had accepted the provisions of the act concerning post roads, and was operating a line of telegraph along the post roads of Alabama and in other states and was engaged in interstate commerce, and it was held that no state has a right to levy a tax upon interstate commerce in any form, whether by way of duties on transportation or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and that a municipal ordinance imposing a license fee on telegraph companies engaged in such commerce and a fine for the violation of it was unconstitutional.² These cases were referred to in *Western Union Teleg. Co. v. Alabama*,³ and it was held that no tax can be imposed by a state upon telegraphic messages sent from one state into another by a company which has accepted the provisions of the post-roads act or upon receipts derived therefrom; but in *Postal Telegraph Cable Co. v. Charleston*,⁴ it was held that a municipal license fee upon business done exclusively within the state was not invalid, although the company had accepted the provisions of the post-roads act; and in later cases the doctrine announced by Mr. Justice Miller in the case against Massachusetts, above referred to,⁵ was affirmed, and it is well settled that state taxation upon interstate telegraph lines using post roads, based upon the proportion of

¹ 127 U. S. 411, 2 Am. El. Cas. 63.

³ 132 U. S. 472, 3 Am. El. Cas. 1.

² 127 U. S. 640, 2 Am. El. Cas. 79 (1888), referring to *W. U. Teleg. Co. v.*

⁴ 153 U. S. 692 (1894).

Texas, 105 U. S. 460; *W. U. Teleg. Co. v. Pendleton*, 123 U. S. 347, and many other cases.

⁵ *W. U. Teleg. Co. v. Massachusetts*, 125 U. S. 530.

the length of the line within the state to the length of the line throughout the whole country, is not invalid under the constitution.¹

§ 190. *Miscellaneous matters.*—In *Western Union Telegraph Co. v. Western & Atlantic R. R. Co.*,² it was held that a contract between a railroad company and a telegraph company, by which the latter was to put up a wire for the exclusive use of the railroad company, connecting it with the various stations and furnishing all the necessary instruments for the exclusive use of the railroad company, was not a sale of the wire, and that a lessee of the railroad took the property subject to the terms of the contract and acquired only such interest in the wire as the lessor had.

In *Western Union Telegraph Co. v. Baltimore & Ohio R. R. Co.*,³ it was held that a license by a railroad company to maintain a telegraph line along its road so long as the licensee existed, expires with the expiration of the telegraph patents held by the licensee, notwithstanding the re-incorporation of the company.

In *Southwestern R. R. Co. v. Southern & Atlantic Telegraph Co.*,⁴ it was held that an act of a state legislature permitting a telegraph company to erect and maintain its line upon the right of way of railroad companies and declaring that the injuries to the latter must be appraised by arbitrators, was unconstitutional because it made arbitration compulsory and because it contained no provision for enforcing the award, even if the parties should agree to arbitrate.

In *Ontario & Western Ry. Co. v. Western Union Telegraph Co.*,⁵ it was held that a telegraph line put up and operated by a telegraph company along the line of a railroad on poles belonging to the railroad company is part of the real estate, and was covered by a mortgage given by the railroad company on its railroad and plant.

¹ *Massachusetts v. W. U. Telegr. Co.*, 141 U. S. 40, 3 Am. El. Cas. 20 (1891); *Postal Telegr. Cable Co. v. Adams*, 155 U. S. 688, 5 Am. El. Cas. 636 (1894); *W. U. Telegr. Co. v. Taggart*, 141 Ind. 281, 5 Am. El. Cas. 646 (1895); *Same v. Same*, 163 U. S. 1, 6 Am. El. Cas. 621 (1896); *Adams Express Co. v. Ohio*, 165 U. S. 194 (1896). On the subject

of state taxation see also *In re Taxation of the Penn. Telephone Co.*, 40 N. J. L. 91; *Commonwealth v. Smith's Express Co.*, 92 Ky. 38, 3 Am. El. Cas. 13 (1891).

² U. S. Sup. Ct., 1 Otto, 283.

³ 20 Fed. Rep. 572.

⁴ 46 Ga. 43, 1 Am. El. Cas. 32 (1878).

⁵ 33 Hun (N. Y.), 205 (1885).

It was held by the supreme court of Canada that the erection of a telegraph line by a railroad company on the line of another road which it controls is a mere trespass upon the rights of a telegraph company which has leased the telegraph lines of the other road, and not a *trouble de droit* under article 1616 of the Canadian Civil Code.¹

¹Gt. Northwestern Teleg. Co. v. Montreal Teleg. Co., 20 Can. Sup. Ct. 170.

For cases relating to the relation between the telegraph companies and the Union Pacific Railroad Company under the acts of congress providing for the construction of that railroad and conferring special powers and duties with reference to the telegraph, see West. Union Teleg. Co. v. Union Pacific R. R. Co., 1 McCrary, 418, 583, 3 Fed. Rep. 1, 423; Cent. Branch Union Pacific R. R. Co. v.

West. Union Teleg. Co., 3 Fed. Rep. 417; citing and affirming Atl. & Pac. Teleg. Co. v. Union Pacific Teleg. Co., 1 Fed. Rep. 745; United States v. West. Union Teleg. Co., 50 Fed. Rep. 28; Union Pac. Ry. Co. v. United States, 59 Fed. Rep. 813, 19 U.S. App. 531; United States v. Union Pac. Ry. Co., 160 U.S. 1, reversing 19 U.S. App. 531, and affirming 50 Fed. Rep. 28.

As to telegraphs under natural streams, see Blanchard v. West. Union Teleg. Co., 60 N. Y. 510.

CHAPTER XIII.

INTERFERENCE OF DIFFERENT KINDS OF ELECTRIC CURRENTS.— CONFLICTING USES OF ELECTRIC WIRES IN THE STREETS.

§ 191. **The use of the telephone disturbed by electric light and electric railway currents.**—The new uses of electric wires have led to controversies between the new and the old. The telephone having obtained possession of the streets, naturally resented the intrusion of the newcomers, and with good reason, because it was found that the more powerful currents of the electric light and the electric railway caused serious disturbance in the delicate variations of the current required to transmit the sound of the human voice.

The wires did not touch one another; there was no interference with any tangible property; but there was, nevertheless, a serious disturbance of the current used for the telephone. Electricity operates at a distance, and the currents are carried, not only along the wires, but also through the earth; and when new wires were strung along the streets parallel with the telephone wires, and the strong currents required for light and motive power were sent through them and came back again through the earth, the telephone current was affected so that buzzing sounds were heard instead of the human voice; the call-bells were rung and false alarms were given, so that the business of the telephone companies was greatly disturbed and their subscribers were seriously annoyed.

Strenuous opposition, therefore, was made by the telephone companies to the use of the streets, first for electric-light wires, and afterwards for the electric railway, and there has been much litigation and some conflict of decisions.

§ 192. **Causes and manner of the disturbances explained.** Without going into a discussion of electrical phenomena, we must state in a few words the facts out of which the conflict arises. The telephone as it has been ordinarily constructed makes use of the earth for the return current, and the electric railway, in using what is known as the single trolley system,

also makes use of the earth even though the wires are grounded in the rails.

The earth was used for the return current by Professor Henry when he worked the first electric telegraph line on the college campus at Princeton in 1835,¹ and the earth has been in common use ever since for the purpose of completing the circuit in all applications of the electric current. It is possible, of course, to use a metallic circuit, but it is cheaper to use the earth, and the earth is used in common by all. Continuous currents passing through the earth have little effect upon one another, but a pulsating or discontinuous current disturbs another current. The telephone requiring a delicate pulsating current is affected even by the currents of other telephones, and much more by the strong and varying currents produced by the dynamos generating electricity for light and power. The effect varies with the nature of the soil, and the manner in which the several circuits are grounded; but when the telephone uses the earth for its circuit, it is almost inevitably disturbed by the use of the earth for dynamic currents in the same direction and locality.

§ 193. The same subject—Induction and leakage.—When two systems use the earth for a return current, there is also interference by induction between parallel wires running near together, a current in one wire inducing a similar current in the opposite direction in the other, so that even a conversation over one wire can be heard by one using a telephone on the other, and the pulsations of a dynamic current make a buzzing sound which drowns the sound of the voice.

Still another cause of disturbance is leakage, by which one current grounded near another passes over to it and increases its force. This took place when both currents sought the same course on their return; and since telephone wires were often grounded by means of water pipes and gas pipes, disturbances frequently occurred by reason of leakage from the electric-light currents.

Since the telephone current is weaker and the use of it depends upon the accuracy of its pulsations, all these disturbances are very injurious to the telephone system, and the value of it

¹ Joseph Henry and the Magnetic Telegraph, an address delivered at Princeton College, June 16, 1885, by Edward N. Dickerson, LL.D. New York: Charles Scribner's Sons, 1885, p. 19.

would be greatly impaired if it were to be subject to such disturbances.

§ 194. Electrolysis.—It is not only the telephone that is injured by the escape of the electric current. There is still another cause of complaint in the use of the streets for lines of electric wire. It has been found that when the ground is used for the return of the powerful currents of the electric railway and the electric light, a portion of the current seeks and follows any metallic substances, such as gas and water pipes or the steel frames of buildings; and where the current leaves the surface of the metal in any damp place underground, chemical action takes place, which causes a slow corrosion of the metal and produced serious injury.

§ 195. Some of the difficulties may be avoided by the use of the metallic circuit — Objections to this.—These disturbances are due to the grounding of the circuit, and most, if not all, of these difficulties can be avoided by the use of a metallic circuit for the return current. The metallic circuit is used in all the systems of electric lighting, but in some of them there is a third or neutral wire which is grounded and sometimes carries a current, and even without this the metallic circuit is not always evenly balanced, and leakage and induction sometimes occur. The electric railway uses the rails "bonded" by copper wire, but they are not insulated, and the current is always a grounded current unless a second trolley wire be used for the return. The double trolley system, however, is expensive to build and complicated in operation. The telephone can use a metallic circuit, but to have a double wire for every instrument would be very expensive; and by what is called the McCluer device, a common return wire may be used by which substantially the same purpose is accomplished.

§ 196. Telephone companies insisted that they were entitled to protection.—The telephone companies having set up their wires in the streets with the consent of the authorities, and having spent much money in building up a profitable business of great public utility, insisted that they were entitled to protection against the use of the streets by other and more powerful currents which damaged their business and impaired the value of their property. They said that, having established their business and set up their wires long before

the electric light and electric railway companies were organized, they were not obliged to adopt new and expensive devices for neutralizing the effect of the new currents, and that, on the other hand, the other companies should not be permitted to use the streets unless they would adopt return wires and use all other devices necessary to prevent their current from disturbing that of the telephone.

§ 197. The first contest was with the electric-light wires.—The electric-light wires were the first to disturb the telephones, and the first struggle took place between the telephone and the electric-light companies. Bills for injunction were filed in many courts, and many temporary injunctions were granted, but very few cases have been reported, and not many have come to final hearing. There was no serious difficulty in so stringing the electric-light wires as to keep them at some distance from telephone wires, and insulating them so that the induction was not felt at that distance, and much of the difficulty from leakage could be avoided by the exercise of due care. A practical settlement was therefore made in many cases, after a sharp fight, before a final decision had been reached by the courts.

§ 198. Electric-light wires—Decisions—Nebraska.—There is a case in Nebraska¹ in which the court interfered so far as to protect telephone wires already set up in a street, by compelling the electric-light wires to be kept at a certain distance from them, but relief was refused as to those streets which had already been occupied by the electric-light wires. The bill alleged that incandescent-light wires could not be operated parallel with telephone wires at a less distance than three feet, nor arc-light wires at a less distance than ten feet, without interfering with the use of the telephone wires and preventing the transaction of the plaintiff's business, and that if arc-light wires crossed telephone wires at a less distance than ten feet, unless they were securely boxed, there was danger of accidents. The decree of the district court enjoined the electric-light company from using for arc-light purposes any wires running parallel and on the same side of the street with the plaintiff's telephone wires, and from using for incandescent-light purposes any wire

¹ Nebraska Teleph. Co. v. York Gas & Electric Light Co., 17 Neb. 284, 43 N. W. Rep. 126 (September 17, 1889).

which ran parallel with the plaintiff's telephone wire on the same side of the street, and less than eight feet from the telephone wire, or in any case for a distance of more than three hundred feet; and it was provided that in all cases a strong guard wire should be suspended across the lines every one hundred feet, midway between the telephone and electric-light wires, so as to prevent the upper wires from falling upon the lower. This injunction, however, was confined to those streets which had been first occupied by the telephone wires, and was refused with respect to streets in which the telephone wires had not been put up until after the electric-light company had commenced their work in pursuance of a plan which had been submitted to the officers of the telephone company and pronounced satisfactory. The district court also granted an injunction in the latter case against the maintenance of the telephone wires. The supreme court sustained this decision, except with respect to the injunction against the telephone wires. On this point the court said there was no evidence that the telephone current had the slightest appreciable effect on the electric-light current, nor that there was any danger from the former current, and that, besides, there was no prayer in the answer for an injunction against the plaintiffs.

§ 199. *The same — Ohio.*—In a case in Ohio¹ it was held that an electric-light company putting up wires no nearer than three or four feet from an existing parallel telegraph wire would not be enjoined before final hearing, the bulk of the testimony showing that no sensible diminution of current by induction would be caused at that distance, and that the line-men would incur no risk except in repairing and taking down the wires, when, on notice, the electric current could be stopped. The danger from falling wires and from storms, the court said, was too uncertain to be considered, and it was added that if an injunction were awarded it would be with these limitations and with leave to move to modify it after experiment.

§ 200. *The same — Ontario.*—In *Bell Telephone Co. v. Belleville Electric Light Co.*,² an application was made by the telephone company for an injunction against the electric-light

¹ West. Union Teleg. Co. v. Champion Elect. Light Co., 14 Cin. Week. Bull. 327. ² 12 Ontario Rep. 571 (1886), 2 Am. El. Cas. 330.

company. It appeared that the former had put up its wires in the streets in 1884 and that the latter strung its wires there in 1886, using the same side of the streets, and putting its wires only two feet below the telephone wires and so near them that there was danger of interference of the currents by induction and also of contact by reason of breaking or sagging wires. The court held that although the telephone company was in possession of the ground under lawful authority, it had no exclusive right to the use of that side of the street on which it had placed its wires, but that being first on the ground it had the right to be protected against injurious interference with its property or business. It was found that there was danger in the position of the wires, and it was ordered that the electric-light company, being the wrong-doer, should transfer its wires to the other side of the street.

§ 201. *The same — Alabama.*—The supreme court of Alabama, in a contest between two electric-light companies, said: "It is certainly true that the company which with authority first occupies a reasonably sufficient space for its works along a street border, thereby acquires the right not to be molested in its possession. It cannot, however, claim more space than is reasonably sufficient for the safe and successful operation of its works." It was held that the defendant, which was about to string wires in the same streets, had not sufficiently answered the specific allegations of interference, actual and threatened, with the complainant's previously established rights.¹

§ 202. *The same — Vermont — Texas.*—In a later case in Vermont² it was held that although the company first in occupation does not obtain an exclusive franchise to maintain its line in the street, yet the rights of a subsequent licensee are subordinate and must be exercised in such a manner as not to interfere with the property and business of the other company. Both companies were engaged in the business of electric lighting, and the defendant company placed its wires so near those of the complainant that there was danger of contact. The court said the wires should not be nearer each other than twelve inches, and that the cross-arms should be at least two

¹ *Consol. Electric Light Co. v. People's El. Light & Gas Co.*, 94 Ala. 372, 4 Am. El. Cas. 250 (1892). ² *Rutland Electric Light Co. v. Marble City Electric Light Co.*, 65 Vt. 377, 4 Am. El. Cas. 256 (1893).

feet apart, so that the wires when loaded with snow and ice or when swayed by the wind should not come in contact; and the court ordered a permanent injunction restraining the defendant from maintaining its wires so as to interfere with those of the complainant, and directed an accounting for the damages already suffered. In a case in Texas¹ it was held that a telephone company having a franchise superior in point of time to an electric-light company was entitled to an injunction restraining the latter company from stringing wires so near those of the complainant as to impair the efficiency of its telephone service.

§ 203. The same — United States circuit court, California.— To the same effect was the decision of the United States circuit court for the southern district of California in 1896² in favor of a telegraph company. The injury threatened in this case was induction of the current. It was suggested by counsel that electric lighting was necessary to the primary use of the streets for public travel, and that by the post roads act it was expressly provided that the privileges conferred upon a telegraph company should not interfere with "ordinary travel." The court said this was a question to be considered carefully when presented for decision, but that it did not arise in this case, because the electric-light company was engaged in transmitting electricity not only for lighting purposes, but also for propelling machinery, and that as against this latter use the act of congress confers a superior right when fortified by prior occupancy.

§ 204. The same — Indiana.— In a local court in Indiana³ it was held that as between two electric-light companies, each having permission to use the streets and each furnishing light for business and domestic purposes, the one which had also a contract with the city to light its streets and public places had the superior right, although it was later in point of time in the

¹ *Paris Electric Light & Ry. Co. v. Angeles Electric Teleg. Co.*, 76 Fed. South Western Teleg. & Teleph. Co., Rep. 178, 6 Am. El. Cas. 202.
² *Texas Civil Court of Appeals*, April 19, 1894, 5 Am. El. Cas. 262. See also *New Orleans Gaslight Co. v. Hart*, 40 La. Ann. 474.
³ *Terre Haute El. L. & P. Co. v. Citizens' El. L. P. Co.*, Superior Court of Vigo Co., Ind., Feb. 12, 1895, 6 Am. El. Cas. 193.

² *Western Union Teleg. Co. v. Los*

occupation of the streets, and that the other company was not entitled to an injunction against the alleged interference of currents.

§ 205. **The same — Missouri.**— In *Western Union Telegraph Co. v. Guernsey & Scudder Electric Light Co.*,¹ there was a discussion of the testimony of experts as to the dangers of contact and induction, and as to the question whether the electric wires should be placed above or below the telephone wires, and it was decided that an injunction should be made perpetual which restrained the electric-light company from stringing any wires above those of the telephone company nearer than eight feet, and against maintaining any wires above those of the telephone company without placing thereunder a wire net work or other suitable guard to prevent the electric wires from sagging or falling upon the telephone wires or coming nearer thereto than eight feet. The court said that one electric company could not by prior occupation obtain an exclusive right to the use of the streets, but that the rights of prior licensees must not be invaded by the action of later ones.

The fact that the telephone company might guard against the danger by the use of inexpensive devices was declared not to be a sufficient reason for denying an injunction.

§ 206. **More serious controversy with electric railway companies.**— In the case of the electric railway it was more necessary that the battle should be fought out, for two reasons: first, because the wires cannot be insulated, and secondly, because they must be stretched along a certain line directly over the railroad track. The electric current, moreover, was applied to the uses of the street railway which had long occupied the street, and had acquired a right there before the telephone was invented, and the electric railway, being used for the purposes of public travel, had a stronger claim of right to use the streets than the electric-light wires or the telephone itself.

§ 207. **Electric railway — Decisions — Central Union Telephone Co. v. Sprague Electric Railway & Motor Co.**— One of the first cases was that of *Central Union Telegraph Co. v. Sprague Electric Railway & Motor Co. and the Akron Street Ry. Co.*, in the court of common pleas of Summit county,

¹ 46 Mo. App. 120, 3 Am. El. Cas. 425 (1891).

Ohio, heard in January, 1889.¹ It was a petition for injunction against operating an electric railway by the single trolley without a return wire, in such a manner as to interfere with the working of the telephone system. The case was presented on affidavits, and the court, after saying that this was an unsatisfactory mode of proof, found that the operation of the railway did, in fact, substantially interfere with the use of the plaintiff's telephones; that while the railroad company under the ordinances had a prior right to the use of the streets, yet the city council had no right to grant to either party any privileges to the exclusion of the other. The court said that they were not satisfied from the proof in this case that a return trolley wire, as suggested, would relieve the difficulty, and should hesitate before ordering it to be done lest it should be a useless expenditure of money, and also that they were not absolutely certain that a return wire would relieve the telephones, although it seemed from Mr. McCluer's affidavit that his device would accomplish the result. In such case, they said the expense of adopting this device would be the measure of damages of the complainants, and these could be recovered in an action at law. The prayer for injunction was denied.

208. East Tennessee Telephone Company v. Chattanooga Electric Street Railway Co. and Another Case.—In *East Tennessee Telephone Co. v. The Chattanooga Electric Railway Co.*, in the chancery court of Hamilton county, Tennessee, an opinion was filed June 21, 1889.² A preliminary injunction having been granted restraining the railroad company from using the single trolley system, the case came before the court on bill, answer and affidavits upon a motion to dissolve the injunction. The defendants admitted that they did not propose to use the double trolley system, but said they had adopted a precaution which had never been adopted before to increase the conductivity of the rails and prevent leakage.

Wm. Henry De Witt, special chancellor, said that since he was not fully satisfied that injury would result to the complainants by the operation of the defendants' system, and especially since the defendants had adopted an additional precaution which had never been adopted before, he was content to dissolve the injunction for the present upon condition that the

¹2 Am. EL. Cas. 307.

²2 Am. EL. Cas. 323.

defendants give bond in \$10,000 to secure any damages that might be adjudged to the complainants.

There was also a decision in favor of the telephone company in the case of *The Wichita and Suburban Railway Co.*, in the district court of Sedgwick county, Kansas, June 29, 1889.

§ 209. *Rocky Mountain Bell Telephone Co. v. Salt Lake City Railway Co.*—In *The Rocky Mountain Bell Telephone Co. v. The Salt Lake City Railway Co.*, in the district court for the third judicial district of Utah, July 23, 1889,¹ an injunction against a street railway company was denied by Zane, J., on the ground that it did not appear clearly from the affidavits that the electricity used by the railway company would injure the telephone company if the wires of both were properly insulated so as to prevent leakage, and that it could not be determined on the affidavits whether it was practicable for one or both to insulate them. The same case came before the same judge in the December term, 1889, on final hearing,² and he denied the injunction on the ground that the telephone company could protect itself by the use of the McCluer system of return wires for the telephone circuit, which, although very expensive, appeared to furnish a more perfect service. He said that the court would not enjoin the use of the earth by the defendant for a return current so long as the plaintiff continued to use it, especially as it did not appear to be established that it was practicable for the defendant to give it up.

§ 210. *Wisconsin Telephone Co. v. Eau Claire Street Railway Co. and Sprague Electric Railway & Motor Co.*—The case of *Wisconsin Telephone Co. v. Eau Claire Street Railway Co. and Sprague Electric Railway & Motor Co.*, in the circuit court of Eau Claire county, Wisconsin,³ came before the court on motion for a preliminary injunction against the use of the electric current for propelling cars in the streets until the defendants should have provided against injury to persons and property, and especially against injury to the telephone service and danger to subscribers and employees. The affidavits and exhibits in the cause are valuable as containing a full statement of the facts on both sides of the case, with a full account of the telephone and electric railway, and of the devices used on both sides to prevent interference.

¹ 3 Am. El. Cas. 350.² 3 Am. El. Cas. 356.³ 3 Am. El. Cas. 383.

The opinion of the court was delivered by Bundy, J., on January 29, 1890. He held that the telephone company took their right to use the streets subject to the right of public travel, including new and improved modes of travel, and that if the railroad company using the street for this purpose took reasonable precaution against doing injury, the telephone company could not complain; that the defendants in using the single trolley were using a system in common use; that the evidence was that the double trolley was not practicable, and that to require the use of it would be to require the operation of the line as an electric road to be abandoned; that the telephone company, on the other hand, could operate their line as it was, or else adopt a metallic circuit at an expense not very large, and that therefore an injunction should not be granted. In answer to the claim that the defendants were violating a statute (Laws Wis. 1889, ch. 375, § 112) requiring electric companies to provide suitable insulation and return wires, the judge said that the plaintiffs were in a like position, differing only in the amount of electricity allowed to escape, and that they were not entitled to an injunction on this ground.

§ 211. *City and Suburban Telegraph Association v. Cincinnati Inclined Plane Ry. Co.*—In the case of the *City and Suburban Telegraph Association v. Cincinnati Inclined Plane Ry. Co.*,¹ in the superior court of Cincinnati, an injunction was granted against the railway company on February 12, 1890, and this decision was affirmed by the general term of the superior court in the following December (opinion by W. H. Taft, J.; Hunt, J., dissenting). The decision was put upon the ground that the telephone company had acquired a right to use the streets, and had invested money on the faith of the enjoyment of the present mode of operating their franchise, and that the defendants had no right to disturb them unless they could show that there was no other way in which they could enjoy their franchise to run an electric railway. If by using the double trolley, no matter how expensive it might be, the injury could be avoided, the defendant had no right to ask the plaintiffs to employ a new device. An injunction was ordered unless within six months the necessary changes should be made.

On appeal to the supreme court of Ohio this decision was

¹ 23 Week. Bull. (Ohio), 165.

reversed. The opinion of the court was delivered by Dickman, J., June 2, 1891.¹ The court held that public travel is the chief purpose for which streets are laid out, and that the franchise of a telephone company to use the street is subservient to the rights of the public to use the streets for the purposes of travel; that the public have the right to avail themselves of new and improved modes of travel, and when franchises are granted for this purpose they confer a right paramount to the franchise of the telephone company, and if the operation of a street railway by electricity disturbs the working of the telephone, the telephone company must readjust their methods to meet the new condition. In regard to the use of the earth for a return circuit, the court said this had been done for forty years before the telephone was invented, and although the telephone company had constructed its whole system at great expense with a grounded circuit under lawful authority, it acquired no vested right which was beyond the control of the legislature, and a grant to another company of a right to use electricity for another purpose must be construed as a denial of an exclusive franchise, if not as a repeal of the former grant. Taking this view of the relations of the parties to each other, the court did not discuss the subject of incidental injury to another in the use of one's own property or franchise.

§ 212. **East Tennessee Telephone Co. v. Knoxville St. Ry. Co.**—In *East Tennessee Telephone Co. v. Knoxville Street Railway Co.*, in the chancery court of Knox county, Tennessee,² what may be called an eloquent opinion was read by Chancellor Gibson on April 21, 1890. The suit was brought by the telephone company to enjoin the railroad company from using the earth as a return circuit and from interfering with the electrical condition of the air to the injury of the telephone company. The bill alleged that the telephone company had obtained the privilege of erecting poles in the streets for a telephone line and had a vested right to use a strip of earth along the line of the poles as a return circuit, exclusive of every subsequent user destructive thereof or inconsistent therewith.

¹ Cinc. Inclined Ry. Co. v. City & Suburban Teleph. Ass'n, 48 Ohio St. 390, 27 N. E. Rep. 890, 12 L. R. A. 534.

² 3 Am. El. Cas. 400.

The chancellor denied that the right to erect poles gave an exclusive right to the earth or air for electrical purposes, and said the plaintiffs in effect claimed a perpetual monopoly of the earth on which the city was built for all the uses of an electrical circuit, and that the fact that they used a delicate current was no reason for denying to the people of Knoxville the benefits of all the discoveries and inventions that might be made in the use of electricity in all time to come. The streets are held in trust for the people for the purposes of passing along them and propelling vehicles over them, "and the city has no right to allow the streets to be used for any purpose inconsistent with those rights of travel and transportation. Telephone poles have no connection with travel and transportation, and have no just right on our streets, and are at best mere tenants at will." The courts must see to it that the rights of the people are not surrendered to any person or corporation whatever.

§ 213. **Hudson River Telephone Co. v. Watervliet Turnpike & Railroad Co.**—Early in 1890 the same question came before the supreme court of New York, in Albany county, in *Hudson River Telephone Co. v. Watervliet Turnpike & Railroad Co.*,¹ on application for preliminary injunction, and Mayham, J., granted an injunction *pendente lite* to the telephone company, without prejudging the merits of the case, and on the plaintiff's executing a bond for \$10,000. On appeal to the general term the injunction was continued for thirty days, and until the defendant should give bond to pay the expenses the plaintiff might be put to in putting in a metallic circuit. Landon, J., said the grant to the railroad company made in 1862 to use any power except steam embraced electricity, and that each company, therefore, had its respective rights and privileges along the same streets and highways, one for telephonic purposes and the other for the purposes of railway propulsion; neither party might exclude the other from the use of the space granted to both, although it might be competent for the court to readjust the occupancy so as to afford mutual accommodation. Learned, P. J., concurred.

An appeal from the order of the general term was taken to

¹ *Hudson River Teleph. Co. v. Watervliet Turnpike & R. R. Co.*, 67, 29 N. Y. St. Rep. 22, 694, 8 N. Y. Supp. 497, 3 Am. El. Cas. 387.

the court of appeals, and on June 3, 1890, this court declined to entertain the appeal, on the ground that the granting of an injunction *pendente lite* rests in the sound discretion of the court of original jurisdiction, and that to dissolve the injunction then would inevitably defeat the plaintiff's remedy without a trial.¹ The court said, however: "We have examined with care the questions involved in this case, and we are compelled to say that we entertain grave doubts whether, upon the facts stated in the complaint and affidavits, any cause of action exists in favor of the plaintiff, and whether the plaintiff has any remedy for the injury of which it complains, except through a readjustment of its methods to meet the new condition created by the use of electricity by the defendant under the system it has adopted." A decision on the merits was reserved until after the final hearing.

The report of the referee, Mr. Isaac Lawson, was made on August 6, 1890, and his decision was in favor of the defendant. He found as matters of fact that the plaintiff could obviate the difficulty to some extent, but not wholly, by adopting the McCluer system; that it could obviate the difficulty entirely by making each of its circuits a metallic one; that the defendant could obviate all the damage by adopting the double trolley or the storage battery, and that this would cost less than it would cost the plaintiff to adopt the complete metallic circuit; and yet he held as a matter of law that the plaintiff had failed to establish a cause of action against the defendant.

§ 214. The same continued.—An appeal was taken to the general term from the judgment entered on the report of the referee, and in September, 1891, the judgment was reversed and a new trial was ordered.² Mayham, J., who did not sit on the former hearing, read the opinion of the court. He said it had already been decided in this case³ that neither party had a right to the exclusive use of the street, because both had a grant of power to employ the same invisible agency in the same street, and each must therefore protect itself against the injurious effect of the use of it by the other; but, he said, while this

¹ Watervliet Turnpike & R. R. Co. v. Hudson River Teleph. Co., 3 N. Y. Supp. 177, 31 N. Y. St. Rep. 524, 121 N. Y. 397.

² 61 Hun, 141, 39 N. Y. St. Rep. 952.

³ 56 Hun, 67; § 213, *supra*.

must be the law as to the street, it by no means follows that the same rule applies to private property, or that the railroad, even if it had a right to pervade the street with its current, could adopt a power which could not be confined to this, but would spread out upon the property of the abutting owners and cause disturbance in the stations of the telephone company and its subscribers. The referee expressly found, he said, that the stations were located on private property, and that the telephone service was disturbed by "conduction or leakage" of the railroad current only when it flowed upon private property of the company or its subscribers. He applied to this the principle that one who for his own benefit brings upon his own premises anything which, if it escapes, will do damage, is bound, at his peril, to confine it to his own premises.¹ He referred also to the principle that, when a grant is made to conduct a business, and there are two ways of conducting it, one injurious to third persons, and one which is not, a court of equity will enjoin the use of the former. He said that, from the trial of the action and the report of the referee, it now appeared that the defendant could obviate the difficulty complained of with very much less expense than the same could be done by a change of the plaintiff's system; for these reasons, and because the plaintiff had not an adequate remedy at law, the judgment of the referee dismissing the bill for injunction was reversed and a new trial was ordered. Landon, J., concurred. Learned, P. J., concurred, but based his decision on what he considered the effect of the determination of the court of appeals in declining to dissolve the injunction.

§ 215. **The same case in the court of appeals.**—This conclusion was reversed by the court of appeals in 1890. The decision of this court was based upon the fact that the right of the telephone company to make use of the streets was expressly subject to the condition that it should not interfere with the full, free use of the street for public travel.² The court said: "The plaintiff is not using the streets for one of the purposes to which they have been dedicated as highways, while the defendant is occupying them in such a manner as to expedite public travel and promote the public use to which

¹ *Fletcher v. Rylands*, L. R. 1 Ex. 265, 3 H. L. 330.

² 135 N. Y. 393, 4 Am. El. Cas. 275 (1892).

they were originally devoted." The plaintiff "is not deprived of any property right, but is simply compelled to yield the subservience which it is bound to render under the charter which gave it existence." On this ground the court disposed of the claim of the telephone company to protection against the derangement of the electric currents by means of induction from the street railway wires. Another question, the court said, arose out of the claim that the telephone wires grounded on private property were affected by the discharge of the electric current which escaped from the defendant's rails. With respect to this it was insisted that both parties had a right to make use of the earth and of the natural properties of electricity; but the court said the defendant did more than this in accumulating electricity in large quantities and permitting it to escape and do injury, and that if one collects, either for pleasure or profit, the subtle and imperceptible electric fluid, there would seem to be no great hardship in imposing upon him the same duty as is exacted of the owner of accumulated water, that he should provide an artificial conduit, if necessary, to prevent injury to others.¹ This question, however, was not decided, because the whole franchise of the telephone company was regarded as subject to the use of the streets by the electric railway for public travel.

§ 216. Cumberland Telephone Co. v. United Electric Railway Co.—The question came before Judge Brown in the circuit court of the United States in *Cumberland Telephone Co. v. United Electric Railway Co.*² The bill was filed to enjoin the use of electricity by the street railways of Nashville under any system which makes use of the earth for its return circuit; the bill described the injuries done to the complainants' system, and alleged that they would be avoided by the use of the metallic circuit; the defendants denied that the complainants were entitled to the monopoly of the earth for the return current, and insisted that they should make use either of a complete metallic circuit or of the McCluer device.

Judge Brown (now one of the justices of the supreme court of the United States) said it was not denied that there was

¹ The doctrine of *Fletcher v. Rylands* was applied to the same subject by the English court of chancery in *Nat. Teleph. Co. v. Baker*, referred to in § 217, *infra*.
² 42 Fed. Rep. 273, 3 Am. El. Cas. 408.

serious injury to the telephones, but that it must be borne in mind that the science of electricity is still in its experimental stage; that a device which is to-day the best, cheapest and most practicable may in another year be superseded by something incomparably better fitted for the purpose; and that it is quite possible that the legal obligations of the parties may change with the progress of invention, and whichever party, by the adoption of a new device, could obviate the difficulty, might be obliged to do so, leaving the question of expense and damages to be settled by the courts; and we must therefore consider the case with reference to the present state of the art, and with the possibility that in another year circumstances may so change as to reverse completely the obligations of the parties. After describing the various devices which might be used by the railway and the telephone to obviate the difficulty, he rested his decision on the answer to the question whether when one lawfully using his own property incidentally injures another, "the right of the latter to an injunction does not depend upon something more than the fact that he has suffered an injury, though his right to an undisturbed use of his own may antedate that of the other." He referred to many English and American cases, and said: "The substance of all the cases we have met with in our examination of this question — and we have cited but a small fraction of them — is, that where a person is making a lawful use of his own property, or of a public franchise, in such manner as to occasion injury to another, the question of his liability will depend upon the fact whether he has made use of the means which, in the progress of science and improvement, have been shown by experience to be the best; but he is not bound to experiment with recent inventions not generally known, or to adopt expensive devices, when it lies in the power of the person injured to make use himself of an effective and inexpensive method of prevention. . . . Unless we are to hold that the telephone company has a monopoly of the earth, and of all the earth, within the city of Nashville, for its feeble current, not only as against the defendants, but as against all forms of electrical energy which, in the progress of science and invention, may hereafter require its use, we do not see how this bill can be maintained."

The decision was that if it were shown that the double trol-

ley would obviate the injury to the complainants without exposing the defendants or the public to any large expense, it would be the duty of the defendants to adopt it; but as the proofs showed that a more effectual and less expensive remedy was open to the complainants, the telephone company ought to adopt it, and was not entitled to indemnity from the railway company.

§ 217. An English case — The doctrine of *Fletcher v. Rylands* invoked. — This decision was criticised in an English case on the same subject.¹ Kekewich, J., said: "The question has been carefully considered in America, and I have studied with deep interest the case of *Cumberland Telephone and Telegraph Co. v. United Electric Railway*, 42 Fed. Rep. 273. The judgment of the court in that case, though in no wise binding upon me, has commanded my earnest attention and respect, and but for one circumstance I would not hesitate to allow my own conclusion to be guided by the powerful arguments there set forth. That one circumstance is the want of full adoption of the principle of *Fletcher v. Rylands*. American law apparently holds the owner of land used for a non-natural or extraordinary purpose responsible for the consequences of such user to his neighbor only when they result from his negligence, and if he can satisfy the court that he has not been guilty of negligence, the resulting damage to his neighbor is not actionable. It seems to me that if the principle of *Fletcher v. Rylands* had been fully adopted in America, the conclusion of the court in the case just cited would have been different. . . . After reflecting much on the novelty of the case, on the argument addressed to me, and on the peculiarity of the electric current as distinguished from every other power, I fail to see why the doctrine should not be applied to it. I cannot see my way to hold that a man who has created, or, if that be inaccurate, has called into special existence, an electric current for his own purposes, and who discharges it into the earth beyond his control, is not as responsible for damages which that current does to his neighbor as he would have been if he had discharged a stream of water."

He held that it was not a sufficient answer to the claim of the telephone company for the defendants, the electric railway

¹ *National Bell Telephone Co. v. Baker*, [1893] 2 Ch. 186.

company, to say that the plaintiffs might so change their system as to avoid the danger, but, on the other hand, he came to the conclusion that the defendants, the railway company, were justified by legislative authority in the use of electric power, and that, since it appeared from the evidence that their system was the one in ordinary use, it must be taken to be sanctioned by the legislative grant, and they were not responsible in damages for the consequences.¹

§ 218. Conclusions with respect to electric railway current.—It appears from this review of the cases that the contest between the electric railway and the telephone companies over the use of the streets has not yet been definitely settled by the courts, and it seems likely that the settlement will be made through the ingenuity of inventors rather than by the efforts of the lawyers and judges. The telephone companies have already adopted very generally the “long distance” system, in which the metallic circuit is employed for the purpose of securing the best electrical results and avoiding all danger of disturbance. It is quite certain that public convenience will demand that the streets shall be used for all the electric currents that may be required, and that some way will be found by which this may be done. In the mean time it is the duty of the courts to protect existing property from unnecessary injury without needlessly obstructing the application of such a valuable force as electricity to new uses for the public benefit. It is certainly true, as the courts generally have held, that no one mode of public service has the right to a monopoly of the earth or the air in the line of the streets in the use of electricity, and the power of injunction will only be exercised so as to avoid present injury to existing property until practical men have found a way for all to work together in harmony. Whether the power will be exercised even to this extent is not yet settled, and it may be that the courts will decide that

¹ In Alabama it is held that a telephone company, being first in occupation of a street, is not entitled to an injunction against the use of the street by an electric railway company under legislative authority; yet the railway company would not be permitted to put up its lines in such

a manner as to short-circuit those of the telephone company and prevent messages being sent over them. *Birmingham Traction Co. v. Bell Teleph. Co.* (Ala., 1898), 24 S. Rep. 731. See also *Pennsylvania Teleph. Supply Co. v. Wilkesbarre & S. W. Ry. Co.*, 11 Pa. Co. Ct. Rep. 417.

every one using this force in the public streets must exercise ingenuity to protect himself from the effect of the use of the same force for lawful ends and by lawful means, only insisting that each must use the best appliances practically available and avoid negligence and wanton injury.

§ 219. **Precautions against danger from contact.**—However this may be, there is no doubt that the electric railway company may be required by ordinance to take all reasonable precautions against the dangers incident to the accidental contact of their own uninsulated wires with those of the telephone companies. The railway wires carry strong currents and are necessarily uninsulated, and it has been held that an ordinance requiring the railway company to maintain guard wires at the place of crossing telephone wires so as to prevent contact in case of the breaking of poles or the falling of wires is valid and may be enforced by *mandamus*.¹

Exactly what precautions must be taken cannot, in the present state of the art, be declared as a matter of law, but in an action against the electric railway company or the telegraph or telephone company for an injury from an electric shock, it must be left to the jury to determine whether under all the circumstances the defendant was negligent and whether its negligence was the proximate cause of the injury.² Even though it is the duty of the telephone company to keep its wires from falling upon the uninsulated wire of the electric railway company, yet the latter company, as well as the former, will be liable in damages if it knows that a telephone wire is unsound and precautions are not taken to prevent it from falling upon the trolley wire. In such a case the court said: "While it was the duty of one company not to use unsound and unprotected wires, it was equally the duty of the other not to operate its road under such defective machinery."³

§ 220. **Electrolysis.**—Akin to the interference of one electric current with another is the injury done to metal pipes and other metallic structures underground. This injury is caused by the

¹ Wisconsin Teleph. Co. v. Janesville Street Ry. Co., 87 Wis. 72, 57 N. W. Rep. 970, 22 L. R. A. 759. See also ch. XV, Dangerous Currents.

² Block v. Milwaukee St. Ry. Co., 89 Wis. 371, 5 Am. El. Cas. 293.

³ Shelton v. United El. Ry. Co., 89 Tenn. 423, 3 Am. El. Cas. 477. See also ch. XIII, § 198, and ch. XV.

chemical action set up by the current of electricity as it leaves the surface of the metal in moist earth. It is the same action as is made use of for the purposes of chemical analysis in the process called electrolysis. The legal position is not quite the same as when two electric currents interfere with one another and the right to use the earth in the street is claimed for both. In such a case it may well be that one who uses the earth for the electric current for his own purposes will not be permitted to complain of a similar use of it by others, unless, indeed, the injury may by reasonable care be avoided;¹ but those who have pipes rightfully and necessarily laid in the streets and those who have metal structures in their own ground may reasonably complain of injuries caused by electric currents set in motion by others, even though these currents may be necessary for the lawful purposes of the electric railway or electric lighting; and there can be no doubt that if the use of the earth is not reasonably necessary, or if the injury be due to the escape of the current through negligence or defective appliances, the injured party is entitled to compensation. Even though the doctrine of *Fletcher v. Rylands*² be not applied, the person who, even though with legislative authority, puts the electric current in operation will be required to use the utmost care to prevent it from going where it will injure the property of others, and it would seem reasonable to hold that he is responsible for such injury as an actual trespass, even though the injury were found to be a necessary incident to the use of the current.

There is a case referring indirectly to electrolysis in which it appeared that a gas pipe was corroded either by the salts in the earth or electrolytical action, and the gas company was held liable for damage done by the escape of gas through the earth into a greenhouse. The defendant being engaged in the distribution of so dangerous a substance as gas was required to exercise the utmost care in the construction and inspection of its pipes, and it was held that the jury was justified in finding it guilty of negligence.³

¹ See §§ 216, 217, *supra*.

² L. R. 1 Ex. 265.

³ *Siebrecht v. East River Gas Co.*,
47 N. Y. Supp. 262 (1899).

CHAPTER XIV.

UNAUTHORIZED OBSTRUCTION OF THE HIGHWAY—LIABILITY FOR INJURIES.

§ 221. **Introductory.**—The authority to set up poles and wires in the street is generally made expressly subject to the condition that they shall be so located and constructed as not unnecessarily to interfere with public travel, and this condition would no doubt be implied whether it were expressed or not. The authority given is always subject to the condition that the lines shall be properly constructed, and shall not be dangerous by reason of defective poles, sagging wires, or unguarded currents of electricity.

In discussing the subject of the authority by which poles and wires are put up in the streets, we considered in chapter IV how far this obstruction of the highway, such as it is, was justified by the grant of permission to use the street for that purpose. From the cases referred to in that chapter,¹ it appeared that poles and wires in the street so constructed as to be dangerous, or so placed as to interfere with travel, are regarded as unauthorized obstructions and treated as nuisances, unless the construction and location have been specifically authorized; and that general authority to construct the line is not sufficient to legalize a construction or a location which proves to be dangerous. We may now refer to cases on the liability to persons using the highway for injuries arising from unauthorized obstruction or improper location or construction of the poles, and from negligence in the maintenance or operation of the wires.

§ 222. **Location of the poles — Liability to passengers in cars.**—Since the erection of a pole in the highway in such a place as to create a dangerous obstruction is not legalized by a general grant of authority to set up a line of poles, it follows that a person setting up a pole in such a place is liable to one who is injured by reason of the dangerous location of the pole

¹ Ch. IV, §§ 61, 62, pp. 78, 79.

while he is lawfully using the highway in the exercise of due care.

In a case already referred to¹ in the supreme court of New Jersey, Dixon, J., left it to the jury to decide whether an electric railway pole set up in the middle of the street was in fact dangerous to travelers, even though permission had been given to place the poles where they were in a line between the tracks, and he said that if the pole was in fact so placed as to be dangerous to a person entering a car about to pass the pole, and this person, exercising due care, was injured, the railroad company would be liable in damages.

In a recent case in Rhode Island² the court held that an electric railway company should foresee the possible dangers to which passengers riding on the foot-boards of its open cars may be exposed by a slight movement of the body, when the poles are placed so as to stand only ten or twelve inches from the foot-boards; and that a passenger is under no duty to listen for warnings against danger by reason of poles being so near the car.

§ 223. Location of poles—Liability to travelers on the street.—In a case in the United States district court in Texas it appeared that the plaintiff was driving a gentle horse, which became frightened and ran away, and the plaintiff was thrown against a telegraph pole. The jury were told that if the driver, using all the means in his power to stop the horse, while still in the wagon, ran upon a permanent object of a dangerous character in a public street, the company which put up the obstruction was liable for the injury. Where the pole was located, appears only from the remark that it was “on Church street near Tremont near the corner.” Judge Sabin in charging the jury said: “If it was a dangerous obstruction to the use of the street by the public, the city could not lawfully grant it so as to debar an injured person from recovering any damages he might sustain in consequence of its erection.” “The grant of a permit or direction,” he said, “to locate a

¹ Kowalski v. Newark Pass. Ry. Co., 15 N. J. Law Journ. 50; ch. V, § 62.

² Elliott v. Newport St. Ry. Co., 18 R. I. 707, 28 Atl. Rep. 338, 23 L. R. A. 208, 5 Am. El. Cas. 384, 31 Atl. Rep. 634. It has been held that a municipi-

pal corporation is not liable to a passenger on an electric car for injuries caused by the improper construction of the line in placing the poles too near the track. Kennedy v. Lansing, 99 Mich. 413, 58 N. W. Rep. 470 (1894).

pole or post in a street extensively used as a general thoroughfare both for pleasure drives and for business vehicles, in order to be a valid grant or to be rightfully there, must not only be in accordance with statutes and ordinances, but must also be made subject to the determination of a jury whether the pole or post, so located, is in fact dangerous to the public in the use of the street, including all contingencies incident to the lawful use of the same.”¹

In a later case in Maine² it appeared that a street railway company was authorized to maintain a single or double line of poles, the location of them to be approved by the mayor and engineers, and that one of the poles was placed about eighteen inches outside of the curbstone. The plaintiff was thrown against this pole by the shying of his horse on the approach of an electric car. There was a statute providing that companies maintaining posts and wires for transmitting electric light or power should be responsible for injuries done to persons or property. The court held it was proper to charge the jury that the company was bound, “in placing the pole, to have had forethought as to the needs of the public and the danger to the public, and that they were so bound in placing their posts as not unnecessarily or unreasonably to endanger any person traveling in that vicinity.” It was also held that the judge was right in refusing to charge that, if the pole was located in accordance with the provisions of the charter, then the pole was not legally an obstruction and the plaintiff could not recover.

§ 224. *The same—Another view.*—These decisions were, of course, based upon the assumption that the pole was in fact in a dangerous position.

The mere fact that the pole stands where it may be struck by a runaway horse is not enough to create a liability. In a case in Wisconsin,³ where it appeared that the pole, although on the highway, was within four or five feet of the fence, and as near to it as could be without having the cross-arms project over private property, that there were three traveled tracks,

¹ Wolfe v. Erie Teleg. & Teleph. land v. City of Bangor, 87 Me. 259, Co., 33 Fed. Rep. 320 (1887). 32 Atl. Rep. 892.

² Cleveland v. Bangor St. Ry. Co., ³ Roberts v. West. Union Teleg. Co., 86 Me. 232 (1894), 29 Atl. Rep. 1005, 77 Wis. 589, 20 Am. St. Rep. 143, 46 5 Am. El. Cas. 346. See also Cleve- N. W. Rep. 800 (1890).

and that the plaintiff was driving along the one nearest the pole, when his horse ran away and threw him against it, it was held on demurrer that there was no cause of action. The court said it was plain that the poles did not and could not have incommoded the highway; "the horses ran away and might have run into the fence if the pole had not been there; there was nothing in the entire width of the street to prevent the team from passing over it in safety."

So also, in the United States circuit court for the northern district of Ohio,¹ it was held that a telegraph company having statutory authority to set up poles, exercising reasonable care so as not to incommode public travel, was not required so to locate its poles as to provide against all possible injuries that might be incurred under extraordinary circumstances, and the jury were told to ascertain the location of the pole, and find whether it did so inconvenience the public as to make the location careless or negligent. The plaintiff was required to use due diligence, and the defendant was held not to be liable for the negligence of the plaintiff's driver.

The same principle was affirmed by the supreme court of New York in a case in which a telegraph pole was thrown down by means of a collision with a wagon drawn by a runaway horse.² The plaintiff was driving along the road shortly afterward, and his wagon was caught by the wires which were thrown across the highway. The court held that if the pole was placed at a sufficient distance from the traveled portion of the highway to be safe from vehicles passing along under any ordinary circumstances, the defendant was not bound so to make or manage its line as to guard against severe collisions, the occurrence of which could not have been reasonably expected.³

§ 225. The same — Source and extent of the liability.— Some of these rulings, it will be observed, were merely those of a judge charging a jury, and the cases cannot be regarded as establishing by authority a definite and satisfactory rule of law. It is no doubt true that a person setting up a pole in the

¹ *Sheffield v. Central Union Teleg. Co.*, 36 Fed. Rep. 164 (1888).

² *Allen v. Atlantic and Pacific Co.*, 21 Hun, 22 (1880).

³ As to liability for negligence in

leaving a pole lying in the street and the question of contributory negligence, see *Postal Teleg. Cable Co. v. Zophi*, 93 Tenn. 369, 24 S. W. Rep. 633, 4 Am. El. Cas. 401, note (1894).

street without due regard for the safety of the public in the ordinary use of a street may be liable for injuries directly caused by the presence of the pole, even though he may have had permission or even authority to erect the pole for a certain proper purpose. The liability arises out of neglect of the precautions required by the conditions of public travel, and exists because the grant is made either expressly or by implication subject to the requirements of public safety in the use of the streets.¹ It may even be, as was said by Judge Dixon in the New Jersey case,² that although the poles are located under the direction of the municipal council with the authority of the legislature, the grant is a mere permission of which the grantee need not avail himself, and which he takes subject to the duty to regard the safety of travelers. The duty referred to in that case, however, was the duty of a street railway company to take care of its own passengers, and it may well be that the rights of the general public are limited by the act of the legislature in authorizing the obstruction of the street. It is certain that as against the corporate action of the town the location of the poles by the permission of the municipal authorities under legislative sanction is a complete justification.³ With respect to the rights of individuals there may still remain an appeal to the courts. This appeal, however, cannot be made on the general question whether the pole is in fact dangerous. The real question is whether it is or is not lawful. If it is lawfully placed where it is and as it is, it is not a nuisance and cannot be a cause of action.⁴ The question will rather be whether the authority is not subject to the condition that due regard shall be had for the public safety, and if so, then the question of the dangerous character of the obstruction should not be left to the jury to determine, upon their own opinion of the

¹ Gaslight & Coke Co. v. Vestry of St. Mary Abbott's, 15 Q. B. D. 1 (1884); Biscoe v. Great Eastern Ry. Co., L. R. 16 Eq. 636 (1871); Lawrence v. Great Western Ry. Co., 16 Q. B. 643 (1851).

² Kowalski v. Newark Pass. Ry. Co., 15 N. J. L. 50; ch. V, § 62, p. 79.

³ Chapter V, §§ 62, 63, pp. 78, 79, and cases there cited.

⁴ Mersey Docks Trustees v. Gibbs,

L. R. 1 H. L. 93, 112 (1863); Borden-town & South Amboy Turnpike Co. v. Camden & Amboy R. R. & T. Co., 17 N. J. L. (2 Harr.) 314; British Cast Plate Mfgs. v. Meredith, 4 Term Rep. 794; Boulton v. Crowther, 2 Barn. & Cress. 703; Cleveland & Pittsburgh R. R. Co. v. Speer, 56 Pa. St. 325, 334; Stevens v. Middlesex Canal Co., 12 Mass. 406; National Bell Telephone Co. v. Baker, [1893] 2 Ch. 136.

propriety of making obstructions of that kind, but must be decided in view of the fact that the legislature has authorized the placing of a line of poles for a certain public purpose along and in the street.¹

§ 226. The same — The legislature may modify the rights of the public in the street — Electric railway poles — Conclusion. — Whether an obstruction is dangerous depends a good deal on the manner in which the highway is used by the public, and this depends on the extent of the right of the public to make use of it. It must be remembered that the legislature, representing the public, has the power to change the mode of use, or release the public right by vacating the highway altogether.² The public must adapt themselves to the new uses of the street and exercise due care to avoid authorized obstructions, and if injury happens from neglect of such precautions no one is liable.

It is certainly not true that one who puts up a telegraph pole under authority within the line of the curbstone is liable for a collision with a runaway horse, even though the driver be not to blame. A telegraph pole in this position is no more dangerous than a tree or a lamp post — they are all beyond the space allotted for driving, and drivers must avoid them at their peril.

Poles along the middle of the street for the electric railway seem to present a different question. They stand in that part of the street in which people are accustomed to drive, and they are dangerous to those who use it as they would if no poles were there. The legislature, however, has power to divide the street and make two traveled ways. If a street is wide, a park may be laid out along the middle of it with a fence on either side. In London and some other cities the lamp posts are placed along the middle of the crowded streets for the purpose of driving the traffic into two separate streams; and so, when a double line of street-car tracks has been laid along the middle of a broad street and a line of poles has been lawfully authorized to be set up at intervals between them, the traffic must adapt itself to them. They mark the limits of the traveled way just as much as the curbstones and fences do, and

¹See *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 5 Am. El. Cas. 293.

²Ch. II, § 5, and cases there cited.

persons must take care to avoid them. Individuals have only such rights as the public have, and the public rights are within the control of the legislature. The right of travel in the street therefore is that which the legislature allows. We are speaking now of the rights of individuals exercising the public rights of travel. The question of the rights of land-owners depends on other considerations, for their rights of property are protected by the constitution; but the mere right of public travel may be limited by the legislature to any part of the street it may see proper, or be released altogether, and therefore the question of liability for the injury to a traveler by reason of an obstruction must depend on the question whether the so-called obstruction is authorized or not, and not on the decision of a court and jury as to whether it is in their opinion dangerous.

§ 227. Liability for injuries—Wires hanging too low.—Persons authorized to string lines of wire along and across public roads are bound to use due diligence to place and keep them where they will not obstruct the ordinary uses of the highway or cause injuries to persons traveling upon it. The permission to set up telegraph and electric-light wires is generally made expressly subject to the condition that they shall not interfere with the free use of the highway for public travel and transportation, and even without express words such a condition would no doubt be implied; and it is always understood that statutory powers of this kind are subject to the condition that they shall be exercised in a careful and proper manner.¹

If, therefore, wires are so put up as to obstruct the ordinary use of the street, or if they are suffered to hang down so as to entangle a traveler and cause injury to one exercising due care in the use of the street, the statutory authority will afford no justification in an action for damages. The liability may rest on the mere breach of the duty not to obstruct the street; in such case affirmative proof of negligence is not required, although the company might justify by showing its authority and the exercise of proper care, and that the sagging of the wire was due to accident or to causes not reasonably to

¹ *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93, and other cases cited in note 4, § 225, *supra*.

be expected.¹ It has been suggested that the liability may also be placed upon the ground that in maintaining wires over the streets the defendant has placed there, for his own benefit, something which, if not cared for, may become dangerous to persons lawfully using the street, and the defendant is therefore under obligation to keep it in its proper place.² But the doctrine of *Fletcher v. Rylands* has not been accepted in this country as applicable to circumstances other than those under which it was announced, and it is generally agreed that there must be some negligence to create liability for tort.³

The degree of care required, however, is commensurate with the danger, and there is no doubt that persons maintaining wires suspended above the public streets are held strictly accountable for any negligence by reason of which any injury is caused to travelers and vehicles in the streets.

§ 228. **The same — Decisions.**— A decision upon the liability for obstructing the highway was made in the early days of the telegraph in the supreme judicial court of Maine,⁴ and this, by the way, is the only case on telegraph wires in the streets cited by Scott & Jarnagin in 1868, or referred to in the first series of the United States Digest, ending in 1870.

The defendant, a telegraph company, was authorized by statute to put up a line along the public roads, locating its posts and fixtures so as not to incommode the public use of the highway. A wire hung low over one side of the road, and a stage having turned off the usually traveled track toward the postoffice, the upper part of it was caught in the wire and it was upset, and the plaintiff was injured. The court said the right of the telegraph company to string the wire was subject to the condition that it should not incommode public travel, and it was the right of all persons to pass and repass at their pleasure on any part of the highway, and not merely on that part which the town is obliged to keep in repair. The defend-

¹ Ward v. Atlantic & Pac. Teleg. Co., 71 N. Y. 81; S. C., 27 Am. Rep. 10; Allen v. Atlantic & Pac. Teleg. Co., 21 Hun, 22.

² Thompson on Electricity, 78; Fletcher v. Rylands, L. R. 1 Ex. 265; Rylands v. Fletcher, L. R. 3 H. L. 330.

³ Marshall v. Welwood, 38 N. J. L. 339 (1876); Cumberland Teleph. Co. v. United Electric Ry. Co., 43 Fed. Rep. 273, discussed in § 215, *supra*.

⁴ Dickey v. Maine Teleg. Co., 46 Me. 483 (1859).

ant, therefore, had no right to make the obstruction, and was liable to the plaintiff for the resulting injury.

In a case in Massachusetts, in 1868,¹ the only real question was whether the plaintiff was guilty of contributory negligence, and subject to the decision of this by the jury it was conceded that a telegraph company was liable for an injury to a traveler caused by a wire having fallen from one pole and hanging diagonally across the street within one or two inches of the ground. The plaintiff tried to lead his horses and wagon over it, but it flew up, the wire caught the axle and upset the wagon, a pole was pulled down, and the horses took fright and ran away. The court said it should have been left to the jury to decide whether the plaintiff was exercising reasonable care in thinking the wire would lie flat and in trying to get over it.

It was held in Pennsylvania, in 1888,² that a telephone company is liable in damages for injuries caused by a sagging telephone wire impeding travel. Livingston, J., charging the jury in the Lancaster common pleas, told them that telegraph lines over highways must be put up and kept so that the wires shall not impede or obstruct ordinary travel or render it unsafe, and that if by neglect of those failing to keep them so injury is sustained by a person passing over the highway without fault on his part, the company owning the line will be liable in damages, and that it is not necessary, in order to show negligence in allowing a wire to hang too low, to prove that the company has been notified that the wire is obstructing the streets and has failed to remove it. The charge was sustained by the supreme court.³

Even where the wires have been broken down by ice through the freezing of water thrown upon them in putting out a fire, it has been held that a telegraph company is liable to persons injured by reason of the wires being down. The court said that since it was only by license that the wires had been hung over the street, it was the duty of the telegraph company, after

¹Thomas v. West. Union Telegr. Co., 109 Mass. 156 (1868).

²Pennsylvania Telephone Co. v. Varnau, 5 Lancaster Law Review (Pa.), 74, affirmed in S. C., 5 id. 401, 15 Atl. Rep. 634.

³The decision was confined to the

case of the use of the highway for ordinary transportation. The judge said the rule would not apply to a load thirty or forty feet high. As to wires obstructing the moving of a house, see ch. V, § 63, p. 80.

the fire, to remove such wires as were so exposed as to endanger persons lawfully using the streets.¹

It was held in Colorado territory in 1873² that a company engaged in putting up a telegraph line in a city street was guilty of gross negligence when it allowed a wire to hang within a few feet of the ground while people were passing, and put up no signal and gave no warning. The jury were told that they might give exemplary damages. On writ of error, however, the supreme court of the United States said that in no view of the case was the court justified in telling the jury that exemplary damages could be recovered. The omission to station flag-signals or to give some other proper warning was an act of negligence entitling the plaintiff to compensatory damages, but there was no evidence of wilful wrong.³

§ 229. *The same continued — Guy wires.*— The same principle, of course, applies to guy wires used to support the poles as to the electric wires themselves. In a case in the New York supreme court,⁴ there was a guy wire fastened to a sunken stone in the edge of a narrow road where persons would naturally be compelled to travel. The wire was not easily seen and was hidden by the leaves of trees. The plaintiff, in passing another man's wagon, was obliged to drive over the stone and his wheel was caught in the wire. It was held that the defendant's right to use the highway was subject to the right of use for travel, and that the stone with the wire so near the traveled part of the road made a dangerous snare. The court did not consider the plaintiff guilty of negligence and held the defendant liable.

So also, in Louisiana,⁵ a telegraph company was held liable for an injury occasioned by guy wires stretched across a part of the road called neutral ground, on which it was forbidden to drive. The accident happened to the driver of a fire-engine, who was turning his engine to go to a fire-plug which stood on the neutral ground, and to which he had a right to go for the purpose of putting out a fire. The court said the telegraph company ought to have seen that injury might come from put-

¹ *Nichols v. Minneapolis*, 33 Minn. 430, 1 Am. El. Cas. 762 (1885). to *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U. S. 489.

² *West. Union Teleg. Co. v. Eyser*, 2 Colo. Ter. 141. ⁴ *Sheldon v. West. Union Teleg. Co.*, 51 Hun, 591 (1889).

³ *West. Union Teleg. Co. v. Eyser*, 91 U. S. 495 (1875), reported in a note ⁵ *Wilson v. Gt. So. Teleph. & Teleg. Co.*, 41 La. Ann. 104, 6 S. Rep. 781 (1889).

ting wires so low in such a place, and was therefore in fault and liable in damages.

In a later case¹ it was held that an electric railway company was negligent in placing guy wires over the track of a steam railway in such a position that a brakeman standing in the ordinary course of his duty on the top of a freight car was caught by the wire and killed. The steam railroad company was also held to be liable for permitting the wires to remain in such a position, and it was found that the brakeman was under the circumstances not guilty of contributory negligence. In another case² a guy wire attached to a post about four feet high, placed in the carriage way, was held to be a dangerous obstruction to the street, and a person injured thereby was held to be entitled to damages, although the accident would not have happened but for her horses having been frightened.

§ 230. Wires hanging too low — Contributory negligence. In the case in Maine above referred to, when it first came before the court in 1857,³ it appeared that a telegraph wire became "slack and drooped so low" that a stage-coach in which the plaintiff, Mrs. Dickey, was traveling was caught in it and overturned. On a motion for a new trial, after a verdict for the plaintiffs, the court said: "It was not sufficient for the plaintiffs to prove that the defendants were in fault. To entitle themselves to a verdict the plaintiffs were bound to show that there was no neglect or want of ordinary care contributing to the injury on the part of the female plaintiff," and the court held (following the doctrine of *Thorogood v. Bryan*, which has since been overruled⁴) that if the driver of the stage-coach were guilty of neglect or want of ordinary care, the plaintiffs would be as much affected thereby as if Mrs. Dickey were the driver. It appeared that the driver knew the wire was too low to pass under, and had several times lifted it while passing, and this time he let it remain in front of the stage while he stopped

¹ *Erslew v. New Orleans, etc. R. R. Co.*, 49 La. Ann. 86, 21 S. Rep. 153, 6 Am. El. Cas. 333.

² *Lundeen v. Livingston El. Lt. Co.*, 17 Mont. 32, 6 Am. El. Cas. 322, 41 Pac. Rep. 995.

³ *Dickey v. Maine Telegraph Co.*, 43 Me. 492.

⁴ 8 C. B. 114 (1849). See *Mills v. Armstrong, The Bernina*, 13 App. Cas. 1 (1888); *Bennett v. N. J. R. R. & T. Co.*, 36 N. J. L. 225 (1873); *N. Y., L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161 (March, 1885); *Little, Receiver, v. Hackett*, 116 U. S. 366 (October, 1885).

at the postoffice, and he allowed the horses to start before the wire was removed. The judges thought he was guilty of gross negligence, and set aside the verdict; but a second verdict having been rendered for the plaintiffs on somewhat different evidence, the court allowed it to stand.¹

The true rule in such cases is clearly stated, however, by Judge Hoar, in a case in Massachusetts,² that "if a party, with full knowledge of the existence of an obstruction or defect in a highway, wilfully or recklessly keeps on, and involves himself in a danger which he had no reasonable ground to believe he could successfully encounter, he acts at his own risk and must take the consequences. But because there is an obstacle to proceeding, it does not follow that it is not consistent with reasonable care to attempt to proceed." In this case the plaintiff, driving along a road, saw a wire hanging diagonally across it between two poles two hundred feet apart and coming within two or three inches of the surface of the earth. He found it would lie flat on the ground the whole distance across the traveled way, and the court held that it was properly left to the jury to say whether the plaintiff was justified in supposing that he could lead his horses and wagon safely over it, and whether he used due care in attempting to do so.

In the Varnau case in Pennsylvania³ the judge was sustained in charging the jury that if the plaintiff saw the wire or knew it was there, and he could not have driven safely under it and could have driven on a lower road, his failure to do so would be such negligence as would prevent a recovery; but if he did not know or see it was there, his failure to take the other road would not prevent recovery by the plaintiff. It was also held in this case that, where a traveler on a highway finds his wagon caught by a wire hanging too low, if he does the best he can in the emergency to extricate himself, the defendant will not be relieved from liability because the plaintiff might have found a way of escape. When a man finds himself placed in a posi-

¹ 46 Me. 483-488 (1859).

² *Thomas v. West. Union Teleg. Co.*, 100 Mass. 156 (1868).

³ *Penna. Teleph. Co. v. Varnau*, 5 Lanc. Law Rev. 71, 401, 15 Atl. Rep. 624.

Where it is attempted to show neg-

ligence in allowing poles to fall, evidence showing that poles forty or sixty rods away did not fall is not admissible, unless it is also shown that they were put up at the same time with those that fell. *West. Union Teleg. Co. v. Levi*, 47 Ind. 523.

tion of danger by the negligence of another without his fault, and, not having time to deliberate, happens to choose a way to escape which is not the best, the law will not impute to him contributory negligence so readily as if he had time to choose with judgment. All that it requires of him is to do as a prudent man would under the circumstances.

So also in a case in Louisiana,¹ it appeared that a drayman, the plaintiff's fellow-servant, knew that an electric-light wire was hanging low, but drove under it in an emergency when the street was obstructed. He was driving a team of five mules drawing a wagon with a large tank upon it, and it was held that the rule as to contributory negligence did not apply. The court said: "Even if there had been error of judgment in the emergency of the moment, it would not have been carelessness or neglect; had the plaintiff freely chosen to drive under the low-swinging wire, and had he negligently driven the tank against it, the principle invoked would apply. In the haste of the moment he did that which possibly any prudent man would have done."

It is not to be expected that a man in driving, or even in walking, along a street will see a small wire stretched across the way or lying upon the pavement when he has a right to suppose that the street is unobstructed; and the fact that he runs into such a wire is not held, as a matter of law, to be contributory negligence, but the question whether he exercised due care will be left to the jury. But if there be danger open and apparent on the street of which the plaintiff is aware, and the plaintiff with his eyes open walks into a wire from which sparks are flying and he is injured, he is not entitled to damages, for he contributes to his own injury.²

In a case in Indiana³ the supreme court overruled a demurrer to a declaration which alleged that an electric-light wire was negligently allowed to remain on and along a sidewalk, and that while plaintiff was walking carefully along the sidewalk, without her fault her foot caught and became entangled in the wire and she was injured.

¹ Williams v. Louisiana Light and Power Co., 8 S. Rep. 938, 43 La. Ann. 295 (1891). etc. R. R. Co., 49 La. Ann. 86, 21 S. Rep. 153, above cited.

² Cook v. Wilmington City Electric Co. (Del. Super. Ct., 1892), 32 Atl. Rep. 643. See also Erslew v. New Orleans, Kelley, 126 Ind. 220, 25 N. E. Rep. 812, 9 Ry. & Corp. L. J. 135 (1890).

CHAPTER XV.

CONSTRUCTION AND MAINTENANCE—LIABILITY FOR NEGLIGENCE—DEFECTIVE MATERIALS AND DANGEROUS CURRENTS.

§ 231. Introductory — Definition of the duty and liability.

Those who set up poles and wires along a public street are subject to the duty to use due care that no injury happen by reason of any defect in their construction or failure to keep them in good condition.

We have already spoken of the obstruction of the street by reason of the improper location of the poles and position of the wires, and also by the failure to keep them in the proper place. We have now to consider the liability for injuries caused by the falling of the poles or the breaking of the wires, and especially the injuries caused by the dangerous currents of electricity with which the wires may be charged.

This liability depends upon the nature of the duty imposed upon those who maintain such a structure in the streets. They are subject, of course, to the duty to take due care, and are liable for negligence; but the amount of care required depends partly upon their relations to the public and partly upon the danger that is incident to neglect.

There is a special duty imposed upon them as occupiers of a structure in or along the public streets to take care that it is well constructed and kept in good repair, and when a heavy object is suspended over a street, or a dangerous current of electricity is used, special care is required because of the very serious consequences of slight negligence. The liability goes beyond liability for the defendants' own negligence, and, in case of known defects, the obligation is that due care shall be exercised, whether by themselves or their servants, or by contractors whom they employ in making the repairs; and yet it does not go so far as to make them responsible for defects that could not be discovered by the exercise of due care, nor for accidents that could not reasonably be anticipated. With regard

to the use of this dangerous current, there is some question whether the obligation does not go still further, and require not merely that the care used be commensurate with the danger, but also that the current be kept under control and not allowed to escape and do harm.

§ 232. **Analogy to the liability of occupier of premises.**—The obligation to maintain the poles and wires in safe condition with respect to passers-by may be likened to that of occupiers of lands and buildings.

The principles affirmed by the authorities on this subject are summed up by Sir Frederick Pollock in his work on torts as follows: "The owner of property abutting on a highway is under a positive duty to keep his property from being a cause of danger to the public by reason of any defect either in structure, repair, or use and management, which reasonable care and skill can guard against."¹ In case of known defects of construction or want of repair the occupier may be liable not merely for the negligence of himself and of his servants, but also for the negligence of an independent contractor carefully chosen. "The duty does not extend to defects incapable of being discovered by the exercise of reasonable care, such as latent flaws in metal; though it does extend to all such as care and skill (not merely care and skill on the part of the defendant) can guard against."²

In *Tarry v. Ashton*,³ for example, a lamp was suspended over the street upon a bracket, and the occupier of the premises, having learned that the bracket was defective, employed a competent man (not his own servant) to repair it, and the repairs were not properly made, and afterwards, by reason of the defect, the lamp fell and injured a servant of the owner. Blackburn, J., said: "It was the defendant's duty to make the lamp reasonably safe; the contractor failed to do that; . . . therefore the defendant has not done his duty and he is liable to the plaintiff for the consequences."

¹ Pollock on Torts, 423, citing *Barnes v. Ward*, 9 C. B. 392; *Corby v. Hill*, 4 C. B. (N. S.) 556; *Byrne v. Boadle*, 2 H. & C. 722; *Scott v. London Dock Co.*, 3 H. & C. 596; *Kearney v. London, Brighton & South Coast Ry. Co.*, L. R. 6 Q. B. 759; *Mullen v. St. John*, 57 N. Y. 567; *Tarry v. Ashton*, 1 Q. B. Div. 314.

² Pollock on Torts, 419; *Readhead v. Midland Ry. Co.*, L. R. 4 Q. B. 379; *Hyman v. Nye*, 6 Q. B. D., at p. 687; *Tarry v. Ashton*, 1 Q. B. D. 314.

³ 1 Q. B. D. 314.

But in *Cork v. Blossom*,¹ in the supreme judicial court of Massachusetts, where a tall chimney was blown down in a gale and caused injury to adjoining premises, the court said: "The defendants are not to be regarded as insurers, and consequently would not be liable if the fall occurred through a hidden defect, which no foresight or examination could have discovered or prevented. . . . By 'proper care' is meant such degree of care as will prevent injuries from any cause except those over which the party could have no control, such as *vis major*, acts of the public enemies, wrongful acts of third persons, and the like, which human foresight could not reasonably expect to anticipate or prevent."

The occupier is not liable in the absence of negligence, but in some cases, as, for example, the falling of an object from a building upon the highway, the accident itself, in the absence of explanation, is evidence of negligence. The maxim *res ipsa loquitur* is applied, and the defendant can only discharge himself by showing affirmatively "that the accident was due to some cause consistent with due repair and careful management of the structure."

But in the application of this maxim it must be remembered that "whenever a right of action springs from the conduct of a defendant the plaintiff must present proof of the facts necessary to the recovery which he seeks," and that "it is the general rule of law that the mere occurrence of the accident raises no presumption of negligence." There must be something in the occurrence from which the negligence of the defendant may reasonably be inferred,— "something in the facts which speaks of the negligence of the defendant."² It must be observed also that there is a distinction to be taken between the liability of the occupier of premises adjoining a highway and that of a person who maintains a structure which the public are invited

¹ 162 Mass. 330, 38 N. E. Rep. 495.

² Per Garrison, J., in *Bahr v. Lombard, Ayres & Co.*, 53 N. J. Law, 233, 23 Atl. R. 167. With regard to the meaning and application of the maxim *res ipsa loquitur*, see also the opinion of Depue, J., in *Excelsior Electric Co. v. Sweet*, 57 N. J. Law, 224, 30 Atl. R. 553; *Smith on Neg.*

246; *Best, Right to Begin and Reply* (Am. ed.), 74; *Bigelow's Leading Cases*, 578, notes to *Byrne v. Boadle*; 1 *Ruling Cases*, 206, notes to *Davis v. Sanders*; *West. Union Teleg. Co. et al. v. State of Maryland*, 82 Md. 293, 33 Atl. R. 763, 6 Am. El. Cas. 210 (1896).

to use for pay, as, for example, a grand-stand, a railway station or a public conveyance. In the latter class of cases there is an obligation in the nature of an implied contract that the building shall be reasonably fit for the purpose to which it is devoted, "so far as reasonable care and skill can make it so," and this obligation is not discharged by showing that a competent contractor has been employed; it must be shown that due care was actually taken in the construction and maintenance of the building.¹ The cases on the liability of an occupier of premises on a public street do not go so far as to hold him liable in the absence of any fault on his part; and it is only when there is a known danger or defect, or at least a danger or defect which due inspection would have revealed, that he is held liable for the negligence of a competent contractor employed to remove the danger or make the repairs.²

§ 233. Application of the principles to construction and maintenance of poles and wires.—These principles may well be applied to those who set up and maintain structures consisting of poles and lines of wire along the public streets. Entirely apart from the fact that the wires may be charged with a dangerous current, the fact that such a structure is set up in a public street, even though duly authorized, involves the obligation to take care that it shall be constructed of good materials, in a substantial manner, so as to withstand all strains that may reasonably be anticipated, and that it shall be maintained in good repair.

If a wire or a cross-arm or a glass insulator should fall and cause injury, it would be for the company controlling the line to show that the fall was due to some cause consistent with the exercise of due care; and if a pole should be thrown down by the mere weight of the wires or by any force reasonably to be expected, it would be necessary for the company to overcome the presumption of negligence which is implied in the occurrence itself.³

¹ Francis v. Cockrell, L. R. 5 Q. B. 501-513; Pickard v. Smith, 10 C. B. (N. S.) 470; John v. Bacon, L. R. 5 C. P. 437; Pollock on Torts, 416.

² Tarry v. Ashton, 1 Q. B. D. 314; Welfare v. London & Brighton Ry. Co., L. R. 4 Q. B. 623; Cooley on Torts, 665.

³ In a case in Indiana, however (Western Union Teleg. Co. v. Levi, 47 Ind. 552, 1 Am. El. Cas. 133), where telegraph poles had fallen, it was assumed that some evidence that the poles were rotten must be produced, and it was held that evidence that other poles in the same line not far

§ 234. **The same — Cases.**— The principles governing the subject are discussed in a case in New Jersey¹ relating to the fall of an electric-light lamp lawfully suspended over the street. There was evidence that the rope by which the lamp was suspended had been frayed by friction, and some evidence tending to show that the pulley and the suspension wires were unsuitable. On the question whether there was sufficient evidence to go to the jury the court said: "The general rule is that the occurrence of an accident does not raise the presumption of negligence, but where the testimony which proves the occurrence by which the plaintiff was injured discloses circumstances from which the defendant's negligence is a reasonable inference, a case is presented which calls for a defense. (*Bahr v. Lombard, Ayres & Co.*,² *Byrne v. Boadle*,³ *Kearney v. London, Brighton & South Coast Ry. Co.*⁴ and *Mullen v. St. John*.⁵) In each of these cases it was held that from the happening of such an accident, in the absence of explanatory circumstances, negligence will be presumed, and the burden is upon the defendant of showing ordinary care." Referring to the charge to the jury the court said: "The learned judge did not charge that the defendant was an insurer of the safety of persons using the highway against injuries from the falling of its lamps. His instruction was that the defendant's duty was to provide a strong, sound and sufficient rope to hold the lamp securely, and to provide good and sufficient rope, wires and pulleys, to have the lamp properly affixed to the rope, the rope run through the pulleys and properly secured to the clamp on the post. This, we think, was an accurate statement of the defendant's duty in respect of its occupation of the public highway for its own purposes." The exceptions were overruled. The judgment, however, was afterwards reversed because the trial judge submitted to the jury a question not raised in the pleadings or evidence,—the question of due care in maintaining a proper cleat upon the pole. The real controversy was over the question of the weakness of the rope.⁶

away were decayed was inadmissible without proof that they had been put up at the same time.

¹ *Excelsior Electric Co. v. Sweet*, 57 N. J. Law, 224, 30 Atl. R. 553 (1894).

² 53 N. J. Law, 233, 23 Atl. R. 167.

³ 2 H. & C. 722.

⁴ L. R. 5 Q. B. 411, 6 id. 759.

⁵ 57 N. Y. 567.

⁶ *Excelsior Electric Co. v. Sweet*, 59 N. J. Law, 441, 31 Atl. R. 721 (1896).

With regard to the liability of the

§ 235. The same — Cases continued. — In a case in Massachusetts¹ it appeared that the plaintiff, while driving in the street, was hurt by the fall of a piece of iron, part of an iron ear used to clasp a trolley wire and keep it in place. The ear broke under the strain, but there was no other evidence that the railway company was in fault; on the other hand there was evidence that the apparatus was put up by a manufacturer of high reputation, and that the device was the best known for the purpose, and that competent men made inspection of the whole line every week. The court held that it was proper to charge the jury that the happening of the accident made it incumbent upon the defendant to show that it had taken due care to make its apparatus safe, and also that the jury might take into consideration, as one of the most important things, the apparent danger — what would be likely to happen if there was a failure to use due care. “These instructions,” the court said, “were in accordance with the rule often stated by the court, as in *Hutchinson v. Boston Gas Light Co.*,² ‘that the vigilance and attention required must conform to the nature of the emergency and the danger to which others may be exposed, and is always to be judged according to the subject-matter, the danger and force of material under the defendant’s charge.’”³

In a case in New York⁴ a glass insulator, resting loosely on a peg on a cross-arm of a high pole, was thrown off accidentally by the act of a lineman disentangling the fire-alarm wires belonging to the city. He was not the servant of the defendant, but the defendant, a telephone company, maintained the pole and had charge of it, although another company had a license

occupiers of dangerous premises, the operators of steam-boilers, etc., see *Malone v. Hathaway*, 64 N. Y. 5; *Sjorgren v. Hall*, 53 Mich. 274; *Wasson v. Pettit*, 26 N. Y. St. Rep. 919, 5 L. R. A. 794; *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl. R. 478; *Norristown v. Moyer*, 67 Pa. St. 355; *Collis v. Selden*, 3 L. R. C. P. 495 (fall of a chandelier in a public house); *Hunt v. Hoyt*, 20 Ill. 544; *Corrigan v. Union Sugar Refining Co.*, 98 Mass. 577; *Burton v. Davis*, 15 La. Ann. 448; *Marshall v. Welwood*, 38 N. J. Law, 339; *Losee v. Buchanan*, 51 N. Y. 476

(the last two relating to steam-boilers).

¹ *Uggla v. West End St. Ry. Co.*, 160 Mass. 351, 4 Am. El. Cas. 389 (1894).

² 122 Mass. 219, 222.

³ See also *Holly v. Boston Gas Light Co.*, 8 Gray, 123. The principal case is cited in *W. U. Tel. Co. v. State of Maryland*, 82 Md. 293, 6 Am. El. Cas. 210, and *Manning v. West End St. Ry. Co.*, 166 Mass. 230, 6 Am. El. Cas. 329.

⁴ *Quill v. Empire State Teleph. & Teleg. Co.*, 92 Hun, 539, 6 Am. El. Cas. 303.

to use the cross-arm from which the insulator fell. The plaintiff, walking in the street below, was injured by the fall. A jury having found a verdict for the plaintiff, the court refused to disturb it, and said: "The defendant, owning, maintaining and controlling the pole, was responsible for any negligent condition of its appurtenances which it permitted to exist by its passive acquiescence, whether such acquiescence followed actual knowledge or resulted from failure to acquire knowledge." It was objected that the circumstances were extremely exceptional, but the court said the defendant, maintaining such a pole in a public place, was bound to guard against the danger, unless its occurrence would, in the minds of reasonable men, be in the highest degree unlikely.¹

In a case in Louisiana, already referred to,² the plaintiff was injured by the fall of an electric-light pole which was dragged down by the wire being caught by a passing dray. It appeared that the pole was not of the diameter required by the contract with the city, and that it was not made of heart timber, as it should have been, and because of the sap it was badly decayed near the ground, and when the wire was caught the pole was pulled down and fell upon the plaintiff. The court said the pole was defective originally, and that ordinary care must be exercised against the weakening and decay of timber from age or the action of the elements. The company was held liable.³

§ 236. Poles and wires thrown down by an external force. Where, however, the proximate cause of the injury is an external force for which the company is not responsible, the question of liability will depend on whether the force was one that might reasonably have been anticipated; whether there was negligence in not having the materials strong enough or sound enough to resist it; and whether the injury was the natural and probable consequence of the negligence.

The obligation of those who maintain the poles and wires in the streets with lawful authority is only that due care shall be taken to guard against such dangers as may reasonably be expected; they are not insurers of the absolute safety of the

¹ Citing *Cleveland v. N. J. Steam-boat Co.*, 125 N. Y. 229; and *per contra*, *Hubbell v. New York*, 104 N. Y. 434.

² 21 Hun, 22 (1880), 1 Am. El. Cas. 310.

³ Other cases involving the same principles are cited in sections relating to Electric Shock, *infra*, § 234 et seq.

structure and are not liable for its breaking down under some extraordinary external force.

In *Allen v. Atlantic and Pacific Telegraph Co.*,¹ a pole standing far enough from the traveled portion of the highway to be safe under ordinary circumstances was struck by a wagon drawn by runaway horses and fell down so that the wires were thrown across the road in such a manner that they caught the plaintiff's carriage and upset it, and the plaintiff was injured. The court held that the plaintiff could not recover if the collision were the proximate cause of the breaking and fall of the pole, and that the judge ought to have charged the jury that, if the pole would not have fallen without the collision, the plaintiff could not recover, and that the jury ought not to have been left with the impression that, although the collision was the cause of the breaking of the pole, they "could find a verdict for the plaintiff on account of their speculations as to the original deficiency in the strength of the telegraph pole to resist such a collision."

In a case in the New York court of appeals, where the poles and wires were broken down by a storm of extraordinary severity, the court said: "The defendant is not absolutely bound to make its posts in the street so strong and secure that they cannot be blown down or broken by any storm. It does not insure the safety of travelers in the streets from injuries by its posts lawfully placed there. It is bound to use reasonable care in the construction and maintenance of its line, so that no traveler shall be injured by it, and the amount of care must be proportioned to the amount of danger and the liability to accident. The poles must be strong enough to withstand such violent storms as may be reasonably expected, but they are not required to be so strong that no storm can break them, or to withstand such storms as reasonable foresight and prudence could not anticipate."²

In *Wabash, St. Louis, etc. Ry. Co. v. Locke*,³ a brakeman over

¹ Page 163, note 2; *Williams v. Louisiana Light & Power Co.*, 43 La. Ann. 205, 8 S. Rep. 936 (1891), 3 Am. El. Cas. 479.

² *Ward v. Atl. & Pac. Teleg. Co.*, 71 N. Y. 81, 27 Am. Rep. 10, 1 Am. El. Cas. 259 (1877). See *Quinn v. Empire*

State Teleph. & Teleg. Co., 92 Hun, 539; *Hubbell v. New York*, 104 N. Y. 434; *Cleveland v. N. J. Steamboat Co.*, 125 N. Y. 299, referred to in § 234, *supra*; *Mitchell v. Charleston Light & Power Co.*, 45 S. C. 146, 23 S. E. Rep. 767.

³ 112 Ind. 404 (1887).

six feet high was standing erect upon a moving freight car, some inches higher than the average. In passing under telegraph wires stretched across the track at a station, his head came in contact with a wire which, from an unexplained cause, had become slackened. The wire being so caught and pulled broke the insulator, and the wire fell and coiled around a man on a flat-car twenty-five feet away, and, catching upon a brake handle of a moving train, dragged the man from the car and he was killed. The court referred to the cases in which persons passing along the highway were struck by objects falling from buildings, and said: "These cases go upon the theory that the injurious thing was inherently and intrinsically dangerous, hurtful and insecure, and that it was hence necessary for the defendant to show that he was exercising reasonable care at the time of the accident. Mischief which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong."

§ 237. Dangerous currents in the wires.—The chief source of danger from electric wires in the streets is the electric current. So long as the wires were used only for the purposes of the telegraph and the telephone the current was harmless, but when wires were strung for the purposes of the electric railway and electric light and power, they were charged with a current that was highly dangerous, and the consequences of the breaking and falling of the wires became very serious. There was danger not merely of the contact of these wires themselves with persons in the streets, but also of their contact with the wires of the telegraph and the telephone, which in turn, if they should fall, or even if they should remain unbroken, might carry the current and give a severe shock to any one who might touch them. For these reasons special precautions are required to keep the heavily charged wires in sound condition and in their proper place, and to prevent the other wires from coming in contact with them. Electric light and power wires are safe if properly insulated and unbroken, but the electric railway wires must be kept bare if they are to serve their purpose, and a telegraph wire that falls upon them is charged with the dangerous current. This state of facts has given rise to some interesting questions as to the liability of

those who maintain the various kinds of wire for injuries caused by electric shock.

§ 238. **Liability of those who maintain the wires.**—If the injury is due directly to the negligence of the persons in control of the wires carrying the dangerous current, there is no question as to their liability to the person injured. If it is due to the negligence of those in control of the harmless wires, and if by reason of the presence of the dangerous wires the danger is obvious, and the injury is the natural and probable consequence of the negligence, there is no question of the liability. But there are cases in which the danger is not obvious, and in which it would not have happened but for the negligence of the owners of the charged wires in allowing the insulation to become defective; and again, there may be cases in which those in control of the highly charged wires are responsible for not taking precautions to guard their wires against accidental or even negligent falling of the other wires through which the shock is given.

§ 239. **Nature and extent of the liability.**—In all these cases those who maintain the wires in the streets under these conditions are chargeable with a high degree of responsibility for maintaining in the public streets something, whether it be the wire or the electric current, which, if not properly kept in place, is likely to cause injury to those who are passing. This responsibility is similar to that of which we have spoken in the former part of this chapter—the responsibility of those who maintain any structure alongside of or over a public street.

But the electric current creates a new element of danger and furnishes a new ground of liability. The difference may be merely one of degree and the ultimate source of liability may be negligence; but the fact that the danger is greater, and the consequences of slight neglect more serious, imposes an obligation to observe a higher degree of care, and even to anticipate accidents or the possible negligence of others. It may perhaps be reasonable to go further than this, and to declare, as some courts have done, that those who for their own purposes, even though under authority of law, have brought such a dangerous force into operation near the surface of a public street, are bound at their peril to keep it where it can do no harm, and are liable if by any accident it gets beyond

their control and does injury. This, however, is a rigorous requirement, not to be enforced unless public necessity seems to demand it. It creates liability without fault, and goes beyond the rule established in England by the well-known case of *Fletcher v. Rylands*,¹ which itself forms an exception to the principle that a fault of some kind is the basis of liability in tort; for in that case the dangerous substance was collected by the defendant, not only for his own purposes, but also without authority of law and for no public purpose, whereas the electric current is used in the streets for a public as well as a private purpose and by authority of law, and the doctrine of *Fletcher v. Rylands* has not been applied by the English courts to cases in which water or other dangerous substance was collected and stored for a public purpose and by authority of law.²

§ 240. **Doctrine of Fletcher v. Rylands applied to the electric current.**—The doctrine of *Fletcher v. Rylands* was declared broadly by Lord Cranworth in the House of Lords, as follows: "If a person brings or accumulates on his own land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been and whatever precautions he may have taken to prevent the damage."³ But Lord Cairns pointed out that the defendant was making a non-natural use of his land in storing water upon it in great quantities, and the doctrine of the case, as we have seen, has not been applied in certain cases in which the act of the defendant was authorized by law.

In a recent English case the doctrine of *Fletcher v. Rylands* was applied to the use of a dangerous electric current by a street railway company under lawful authority for the operation of its cars. The case is *National Bell Telephone Co. v. Baker*, referred to in an earlier chapter.⁴ Kekewich, J., dissenting from the opinion of Mr. Justice Brown in a case in the United States

¹ L. R. 1 Ex. 267; L. R. 3 H. L. 330 (1868). See Pollock on Torts, ch. XII, p. 393 et seq.

² Madras R. Co. v. Zemindar of Carvatenagaram, L. R. 1 Ind. App. 364; Dunn v. Birmingham Canal Co.,

L. R. 1 Q. B. 42 (1872); Gt. West. Ry. of Canada v. Braid, 1 Moo. P. C. (N. S.) 101 (1863); Pollock on Torts, 402-404.

³ L. R. 3 H. L. 340.

⁴ [1893] 2 Ch. 186. See § 216, *supra*.

circuit court,¹ said: "It seems to me that if the principles of *Fletcher v. Rylands* had been fully adopted in America, the conclusion of the case just cited would have been different. . . . After reflecting much on the novelty of the case, on the argument addressed to me, and on the peculiar character of the electric current as distinguished from every other power, I fail to see why the doctrine should not be applied to it. I cannot see my way to hold that a man who has created, or, if that be inaccurate, has called into special existence, an electric current for his own purposes, and who discharges it into the earth beyond his control, is not responsible for damages which that current does to his neighbor, as he would have been if he had discharged a stream of water."

It is to be observed, however, that this was not a suit for damages for injury from electric shock happening by reason of an unforeseen accident, but a question of the liability for deliberately allowing the powerful current to escape into the earth, where it was sure to disturb the operation of the current of the plaintiff.

§ 241. Doctrine of *Fletcher v. Rylands* not fully adopted in the United States.—It is true that the doctrine of *Fletcher v. Rylands*, in its broadest sense, has not been generally accepted by the American courts, and liability for damages, even in cases similar to that, has been placed upon the negligence of the precautions which the peculiar circumstances seemed to require, or a breach of the duty of extreme caution imposed upon the defendant by reason of the danger which he himself has created.²

Chief Justice Beasley, in *Marshall v. Welwood*,³ a case of an injury to neighboring property by the explosion of a steam boiler, declined to accept the doctrine of *Fletcher v. Rylands*, or to admit that a man is in law an insurer that his acts done lawfully and with due care shall not injuriously affect others, and insisted upon the common-law rule "that in order to sustain an action of tort the damage complained of must come from a wrongful act."

¹ Cumberland Teleph. & Teleg. Co. v. United Electric Ry. Co., 42 Fed. Rep. 273.

² *Losee v. Buchanan*, 51 N. Y. 476 (1873); *Brown v. Collins*, 53 N. H. 442,

2 Ames & Smith's Sel. Cases on Torts, 357 (1873); *Marshall v. Welwood*, 38 N. J. Law, 339, 2 Ames & Smith's Sel. Cases on Torts, 352 (1876).

³ See note 2.

The courts have applied to the use of the electric current the doctrine of this and other cases relating to the duties and liabilities arising out of the lawful use of dangerous articles; and the rule laid down is not that those who bring the electric current on wires along the streets are bound at all hazards to keep the current from doing harm, but rather that they are under obligation to exercise the high degree of care which the danger of the situation requires, and that this involves the duty to anticipate and to take precautions against any occurrences that may reasonably be looked for; and if any accident happens by reason of the escape of the dangerous current, it is for those who control the wires to show that it happened from some cause beyond their control, and not by reason of any want of care in the construction or maintenance of their appliances.

§ 242. Duty measured by the danger.— There are cases in which it is held that persons dealing with articles so dangerous as to constitute a public nuisance are responsible for any damage they may do, even in the absence of negligence in dealing with them, as, for example, the case of the explosion of dynamite stored near a dwelling-house,¹ or the injury to a house by the blasting of rocks in the neighborhood,² even though the work in hand in either case were authorized by law.

In such cases as these, where the work is one that, in the ordinary mode of doing it, is a nuisance, the defendant is liable for the consequences, even though he is careful in the conduct of the work, or though the negligence be that of an independent contractor carefully chosen.³ There are other cases in which the danger is not so serious nor so imminent, where the article is dangerous if not carefully dealt with, and yet the dealing with it is not in itself a nuisance. In such cases the care that is required is commensurate with the danger, but there is no liability except for want of such care. The liability in such cases is not merely to persons with whom there is a contract, but also to the public and all who may reasonably be expected to be put in peril by the neglect. In one of

¹McAndrews v. Collerd, 42 N. J. Law, 189.

²Hay v. Cohoes, 2 N. Y. 159; Train

v. Cohoes, 2 N. Y. 163; Wood on Nuisances, § 750.

³Cuff v. Newark & N. Y. R. R. Co., 35 N. J. Law, 17.

these cases¹ the court said: "In all cases in which any person undertakes an act which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law *ipso facto* imposes as a public duty the obligation to use such care and skill."

This principle has been applied to the liability of those who deal in or have control of loaded fire-arms,² and explosive or highly inflammable materials,³ poisonous drugs,⁴ gas⁵ and steam boilers,⁶ and also to persons engaged in a public employment dealing with dangerous machinery or appliances.⁷ There are many circumstances under which the same principle is applicable for determining the liability for injuries arising out of the use of dangerous currents in electric wires in streets and highways. The use of the electric current is authorized by law; it will do no harm if kept in its proper place, but is very dangerous if allowed to escape. Those who use it are charged with a public duty to use the greatest care to keep it from doing harm, and for failure to observe this care they are responsible to persons using the public streets who may be injured without fault of their own. The application of the principles to the facts may be best seen by examining the reported cases.

§ 243. Cases on liability for escape of electric current in public highway.—In *Haynes v. Raleigh Gas Co.*,⁸ the defendant maintained a line of poles and wires in the streets for electric lighting. Two guy wires supporting one of these poles became loose, one of them came in contact with a badly insulated feed wire of the electric railway, and the other, touching the first one, hung down to the ground. A boy who grasped this latter wire was killed by electric shock. The court held that it was incumbent on the defendants to show that it was through no fault of theirs that this "live" wire belonging to

¹ Per Beasley, C. J., in *Van Winkle v. American Steam-Boiler Co.*, 52 N. J. Law, 240-247.

² *Dixon v. Bell*, 5 M. & S. 198; Bigelow, Leading Cases, 578.

³ See *The Nitro-glycerine Case*, 15 Wall. 524; *Pollock on Torts*, 407.

⁴ *Thomas v. Winchester*, 6 N. Y. 397; Bigelow, Leading Cases, 302.

⁵ *Parry v. Smith*, L. R. 4 C. P. Div. 325.

⁶ *Marshall v. Welwood*, 38 N. J. L. 339, 2 Ames & Smith's Sel. Cases on Torts, 352.

⁷ *Heaven v. Pender*, 11 Q. B. Div. 503; *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501.

⁸ 114 N. C. 203, 19 S. E. Rep. 344, 5 Am. El. Cas. 264 (1894).

them was hanging down upon the street, and said: "It is due to the citizen that electric companies that are permitted to use for their own purposes the streets of a city or town, shall be required to use the utmost degree of care in the construction, inspection and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances. The danger is great, and care and watchfulness must be commensurate to it."

In *Block v. Milwaukee Street Ry. Co.*,¹ an electric railway company was sued for a shock received from a broken telephone wire which had come in contact with the trolley wire of the defendant's line. The court said: "No doubt it is the duty of the defendant to use such customary and approved appliances as are known and used in the business of operating street railways. So far as reasonable knowledge in the present state of the science and the practical use of electricity as a motive power for street railways, and reasonable foresight, can go, it is bound to guard the public against the perils attendant upon this use of electricity. But it is liable only for what is known as reasonable care;" and it was held that it could not be declared as a matter of law what method of guarding the wires should be required, nor whether any guard should be required; but that it is a question for the jury, under all the facts of the case, to determine whether the method actually used was negligent.

In *Denver Consolidated Electric Co. v. Simpson*,² the two cases last above referred to were cited as authority for the instructions given to the jury; and where it appeared that an electric-light wire charged with electricity had become disconnected with its fastening, and hung over a public alley so as to be dangerous to persons passing, the court said this was *prima facie* evidence of negligence, and that it was not error to charge the jury that in the conduct of such a business the utmost care was required. The better practice, the court said, was to charge the jury that the defendant is bound to exercise the reasonable care and caution which a prudent man would exercise under similar circumstances; that the care increases with the danger, and that when the business is attended with

¹89 Wis. 371, 61 N. W. Rep. 1101, 5
Am. EL. Cas. 293 (1895).

²21 Colo. 371, 5 Am. EL. Cas. 278
(1895), 41 Pac. Rep. 499.

great peril to the public the care must be commensurate with the danger.

§ 244. *The same — Continued.*— In *Western Union Telegraph Co. v. Thorn*,¹ the United States circuit court of appeals in the third circuit approved a charge to a jury in which it was declared that a telegraph company is not bound to insure the absolute permanency of its plant or its poles or wires, and that the mere breaking of a telegraph wire was not evidence of negligence, but that the condition of the wire, and its location with respect to dangerous wires, was evidence of negligence, and the question was one for the jury to determine upon the evidence. Referring to the question whether the breaking of the wire was the proximate cause of the injury, the court of appeals said: "The broken wire was the primary cause of the injuries to the plaintiff. If it had become weakened by long use and exposure to such a degree as to part by its own weight, or from a slight motion produced by the wind, it was a fair question for the jury to decide whether the defendant had not failed in its duty to the public by allowing its wire to get into such a condition that it would easily break, and in breaking would be likely to fall across the electric-light wire and become dangerously charged. It was not incumbent on the plaintiff to prove more under this head."

In *Giraudi v. Electric Improvement Co.*,² it was held that it was proper to refuse to charge the jury that the public, who receive the benefits of convenience and comfort from the supply of a dangerous commodity like electricity, are presumed to know enough of the nature of the element to avoid the dangers which must arise out of its practical use. The court said: "The public — aside from the consumers using the commodity — owe no duty to those introducing it; but on the other hand, it is the duty of those making a profit from the use of so dangerous an element as electricity to use the utmost care to prevent injury to any class of people composing the public, which exists in considerable numbers. They must protect those having less than the ordinary knowledge of the character of the commodity."

¹ 64 Fed. Rep. 287, 28 U. S. App. 123,
b Am. El. Cas. 283 (1894).

² 107 Cal. 120, 40 Pac. Rep. 108, 5 Am.
El. Cas. 318 (1895).

§ 245. **The same — Continued.**— In a case in Arkansas¹ the duty of companies maintaining electric wires in the streets was based upon the rule which requires every one so to use his property as not to injure another, and was likened to the duty to prevent dangerous animals or dangerous substances from escaping; but the decision was based on failure to use care. The court said: "Electric companies are bound to use 'reasonable care in the construction and maintenance of their lines and apparatus.' . . . This care varies with the danger which will be incurred by negligence. In cases where the wires carry a strong and dangerous current of electricity, and the result of negligence might be exposure to death or serious accidents, the highest degree of care is required."

In the court of appeals of Maryland² suit was brought against a street railway company and a telephone company jointly for an electric shock received by a person walking in a street. A telephone wire hanging down had come in contact with the feed wire of the electric railway, and had remained so for two weeks. The court said the privilege granted to the defendants to incumber the public highway with appliances so likely to become dangerous to the public safety imposed upon them the duty of so managing their affairs as not to injure persons lawfully upon the streets, and that if the wires were not in proper condition and by reason thereof the plaintiff was injured, there was *prima facie* evidence of negligence on the part of the defendant.

In a recent case in the court of errors of New Jersey,³ in which a street railway company and a telephone company were sued jointly for an electric shock from a broken telephone wire in contact with a trolley wire, the court said: "One factor in the measure of reasonable care is the probable result of negligence. In the use of a powerful electric current in the public streets, reasonable care is great care."

These cases will serve as examples. There are many others to the same effect.⁴ They are cited in the notes and quoted in the following sections.

¹ City Elec. St. Ry. Co. v. Conery, 61 Ark. 381, 33 S. W. Rep. 426, 6 Am. El. Cas. 217 (1895).

³ New York & N. J. Teleph. Co. v. Bennett, 42 Atl. Rep. 759 (1899).

² Western Union Teleg. Co. v. City & Suburban Ry. Co., 82 Md. 293, 33 Atl. Rep. 763, 6 Am. El. Cas. 210 (1896).

⁴ See the cases cited in the next following sections, and also Western Union Teleg. Co. v. Robinson, 50 Fed. Rep. 810, 4 Am. El. Cas. 342; Mitchell

§ 246. Injury from the electric current—Classification of cases.—Some of these are cases in which the injury was done, not on a public highway, but on private property where the plaintiff may or may not have had a right to be. In others the plaintiff has been a servant of the defendant and the question of the risks of employment has been involved. In others the principal difficulty has been to determine which of two parties was responsible for the injury, or whether the act was the concurrent wrong of both. There are cases involving the question of proximate cause and whether the injury was one that could reasonably have been anticipated, and in many cases it is necessary to decide whether, under the circumstances, negligence on the part of the defendant may be inferred upon proof of the happening of the accident. Examples of these classes of cases are given in the following sections, with some instances of the application of the maxim *res ipsa loquitur*.

§ 247. Injuries from electric current—Liability to persons on private property.—The liability for injuries from the electric current to persons on private property is not precisely the same as that for injuries to those that are using the public streets. In the public streets men have a right to expect safe passage, and those that maintain electric wires there are under obligation to take care that no one shall be injured by means of them; but when the injury occurs on private property, there may be a question whether the person injured was entitled to require that any care should be exercised towards him. He may be a trespasser, and one whose presence was not to be anticipated, or, if not a trespasser, he may still be one toward whom there is no special obligation to take precautions. On the other hand, if he be one that has a right to be where he

v. Charleston Light & Power Co., 45 S. C. 146, 22 S. W. Rep. 767, 6 Am. El. Cas. 245; Newark Electric Light & Power Co. v. Ruddy (N. J. Sup. Ct., 1898), 41 Atl. Rep. 712; Hand v. Central Pa. Teleph. & Supply Co. (Pa. Com. Pl.), 1 Lack. Leg. News, 351; Turton v. Powelton Electric Co., 185 Pa. St. 406, 39 Atl. Rep. 1053; Perham v. Portland Gen. Electric Co. (Sup. Ct. Oreg., 1898), 53 Pac. Rep. 14; Larson v. Central Ry. Co., 56 Ill. App. 263;

Citizens' Ry. Co. v. Gifford, Tex. Civ. App. (1898), 47 S. W. Rep. 1041 (only ordinary care required of electric street railway company); Snyder v. Wheeling Electrical Co., 43 W. Va. 661, 28 S. E. Rep. 733, 39 L. R. A. 499; Gannon v. Laclede Gaslight Co., 145 Mo. 502, 46 S. W. Rep. 968; Lewis' Adm'r v. Louisville Electric Light Co. (Ct. of App., Ky. 1899), 50 S. W. Rep. 992; Devlin v. Beacon Light Co., 43 Atl. Rep. 963 (Pa., 1899).

is, or if he is there by the express or implied invitation of the defendant, the defendant may be under obligation to take care that the premises shall be safe, and that no injury shall be done by reason of the electric wires.

The private property on which the accident happens may be the property of the person maintaining the wires, or it may be the property of another on which, by right or by permission, the wires are maintained. In the former case the liability to one who comes in contact with the wires is, in one aspect, that of the owner of dangerous premises, and so depends upon the question whether the person injured came by express or implied invitation, or was a licensee or a mere trespasser. In the latter case, also, the same principle may well be applied, except that the duty must extend to all who have a right of any kind to come upon the place to which the wires are attached.

§ 248. **The same — The liability of the owner of dangerous premises.**— The duty of a land-owner to those who come there by express or implied invitation is “to take reasonable care to prevent damage from unusual danger.”¹ “There is no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place would reasonably be, having regard to the contrivances necessarily used in carrying on the business.” There is a positive duty to take care that the place shall be in such a condition.² But to those whose entry is by mere permission for their own convenience, and *a fortiori* to actual trespassers, “the land-owner is under no obligation to keep his land in a non-hazardous state.” The mere licensee or the trespasser must take it as he finds it, subject only to abstain from positive acts of injury and from creating concealed dangers which are in the nature of a fraud.³ In such

¹ *Indermaur v. Dames*, L. R. 1 C. P. 274, 2 C. P. 311.

² *Ibid.* See also *Corby v. Hill*, 4 C. B. (N. S.) 556; *Southcote v. Stanley*, 1 H. & N. 247; *Chapman v. Rothwell*, El. Bl. & El. 168; *Wright v. London & N. W. Ry. Co.*, 1 Q. B. Div. 252; *Sweeny v. Old Colony R. R. Co.*, 10 Allen, 363; *Davis v. Central Cong. Church*, 129 Mass. 368; *Bennett v.*

Railroad Co., 102 U. S. 577; *Phillips v. Library Co.*, 55 N. J. L. 307; *D. L. & W. R. R. Co. v. Reich*, 61 N. J. L. 638, 643; *Bigelow on Torts*, 697-701; *Pollock on Torts*, 415; 2 *Shearm. and Red. on Neg.*; 1 *Thomp. on Neg.* 307-317.

³ *Hounsel v. Smyth*, 7 C. B. (N. S.) 731; *Gautret v. Egerton*, L. R. 2 C. B. 371; *Gallagher v. Humphrey*, 6 Law Times Rep. (N. S.) 684, 2 *Ames &*

cases the non-liability rests upon the right of the land-owner to the exclusive enjoyment of the same without liability to others for injuries occasioned by its unsafe condition. It is a rule of property rather than of conduct, and is not inconsistent with liability for positive personal acts of negligence or wilful wrong. There is this distinction between the case of a licensee and that of a trespasser, that the presence of the trespasser is unexpected and that of the licensee ought not to be, and there are acts that are negligent or not, according to the danger of injury to follow.

§ 249. **The same — Other grounds of liability with respect to dangerous electric current.**— Whatever limits there may be upon the duty of a land-owner toward those who have no right to come upon his premises, there are other grounds of liability for injuries caused by negligence in dealing with dangerous currents of electricity. The liability does not extend to all alike. There are differences in the liability with respect to those who come upon the premises by legal right or express or implied invitation and those who come by mere permission and those who are actual trespassers. But the use of electric wires with dangerous currents is something more than maintaining unsafe buildings. A dangerous force is used which is deadly if not kept in its place. It is invisible and makes no noise. It is a concealed danger, and it lurks in wires that may appear to be harmless and may be easily overlooked. An injury done by means of such a force may be a positive tort without reference to any relation between the parties, and there may be liability for negligence in letting the current escape if any one is injured who is using due care, and is not in fault towards the defendant, and whose presence may reasonably be anticipated. The duty of one who makes use of such a force has been likened to that of one who keeps a ferocious beast,

Smith, Sel. Cas. on Torts, 288; Balch v. Smith, 7 H. & N. 736-745; Reardon v. Thompson, 149 Mass. 267; Plummer v. Dill, 156 Mass. 426, 31 N. E. Rep. 128; Severy v. Nickerson, 120 Mass. 306; Vanderbeek v. Hendry, 34 N. J. L. 467; Phillips v. Library Co., 55 N. J. L. 307; D., L. & W. R. R. Co. v. Reich, 61 N. J. L. 638-643; Pollock

on Torts, 427. It is often said that the duty of the land-owner is only to abstain from "acts wilfully injurious;" but see Gallagher v. Humphrey, *ubi supra*, where one using a way by permission was held entitled to recover for injuries due to "active negligence" in the handling of a machine.

who is bound at his peril not to let him escape,¹ or to that of one who stores up water for his own purposes, and is bound to keep it in, or at least to take great care that it does no harm.² The analogy at least suggests the obligation to use great care and responsibility for the consequences of the failure. There is another class of cases in which also the liability arises out of the danger of the act done or the thing dealt with, and depends, not upon the relation of the parties or the place of the injury, but upon the probability that grievous harm will follow the act or neglect. Such, for instance, are the cases referred to in section 242.³

In all these cases there is an obligation to use great care, because for want of it some one is likely to be seriously hurt by means of a highly dangerous object set in motion by the defendant, and the better opinion seems to be that there is a liability to any one who (without his own fault) is injured by it, even though there be no contract or other special relation between the parties, if the injury were reasonably to be anticipated.⁴

The doctrine is confined to cases in which the act is so highly dangerous that there is a duty towards the public to take special care, and in which negligence is likely to result in serious injury to some one.

¹ *Atlanta Consol. St. Ry. Co. v. Owings*, 97 Ga. 663, 6 Am. El. Cas. 271; *May v. Burdett*, 9 Q. B. 101; *Worth v. Gilling*, L. R. 2 C. P. 1.

² *Nat. Bell Teleph. Co. v. Baker*, [1893] 2 Ch. 183; *Fletcher v. Rylands*, L. R. 1 Ex. 267, L. R. 3 H. L. 330. But see §§ 239, 240, *supra*.

³ See also *Farrant v. Barnes*, 11 C. B. (N. S.) 553; *Longmeid v. Holliday*, 20 L. J. Ex. 443; *Lyell v. Granga Dai*, Indian L. R. 1 All. 60; *Boston & Albany R. R. Co. v. Shanly*, 107 Mass. 568; *Smith v. Boston Gaslight Co.*, 129 Mass. 318.

⁴ *Pollock on Torts*, 407-413; *Longmeid v. Holliday*, 20 L. J. Ex., at p. 433; *Van Winkle v. American Steam Boiler Co.*, 52 N. J. Law, 240, 19 Atl. Rep. 472; *Heaven v. Pender*, 11 Q. B. Div. 503, 509; *Thruswell v.*

Handyside, 20 Q. B. Div. 359, 363. This was a case of a man engaged in a work dangerous to others, and bolts and rivets fell on workmen below. In this case *Hawkins, J.*, said: "The rule applicable to this case—I do not say to all cases, for each case must depend on all its circumstances—is that where a man is employed to do certain work, and knows that the work he is doing is dangerous to others, and that accidents are likely to happen, and knows that other persons are lawfully engaged in other work, and are under obligations to perform such work, the person engaged in the dangerous work is subject to the duty of using reasonable care and taking precautions to prevent accidents from happening from the work in which he is engaged."

§ 250. Application of these principles to the use of the electric current.—There are only certain circumstances under which this latter doctrine can be applied to the use of the electric current. It must be borne in mind that the proper use of it is perfectly lawful, and that there are certain dangers that are inherent in the proper use of it and are well known to all. It is incumbent upon all persons to take due care to avoid contact with properly placed wires highly charged with electricity, and there are places where it is not to be expected that men will come in contact with them. There is no general duty to maintain insulation unless, by reason of the circumstances, ordinary regard for the safety of human life requires it, and there are certain electric wires and appliances which cannot be guarded by insulation. The trolley wire, for instance, must be exposed in order to do its work, and if this or any other necessarily exposed conductor is fixed to the private property of its owner, one who meddles with it does so at his peril. Where the wires are maintained upon private property there is a special duty toward certain classes of persons to take precautions against injuring them—a duty that arises out of the relation of the persons to the property and to the defendant, and there are certain places of a public nature where this duty is general; but in the absence of this special duty it is only such negligence as, by reason of the danger involved, amounts to a breach of public duty, that creates a liability.

§ 251. The same—Cases.—In a case in Louisiana, a tin-smith going upon a roof to make repairs received a shock from an electric-light wire; there was evidence of defective insulation where the wire was spliced; and it was held that it was the duty of the company, independently of statutory regulations, to see that their lines were safe for those who by their occupation were brought in close proximity to them.¹ This decision was quoted and followed in a case in Kentucky, in which a man painting a house received a shock from an electric-light wire attached to the house, the insulation having become imperfect. The court said that at such a place as this, where people have a right to go for work, business or pleasure, the

The rule laid down by Brett, M. R., *Light Co.*, 44 La. Ann. 692, 11 S. Rep. in *Heaven v. Pender* was approved. 51, 4 Am. El. Cas. 381 (1892).

¹ *Clements v. Louisiana Electric*

insulation of the wire ought to be made perfect and the utmost care used to keep it so.¹

In a case in Georgia² it was held that where one leaves the street and climbs a pole without permission from or notice to the company to which it belongs, and is injured by reason of the contact of the wires on that pole with the dangerous and improperly insulated wires of another company, he cannot recover damages from either; but when the complaint was amended so as to allege that the plaintiff was not a trespasser, but was on the pole by permission of the owner, and in the usual course of his duties as a telephone lineman, and that his presence should have been anticipated by the other company, it was held that the complaint was sufficient.³

In a later case, under circumstances very similar, the court distinguished between the position of a mere trespasser and a workman engaged in the performance of his duty for another company, and held a railway company liable to the lineman of a telephone company for injury from shock by reason of contact between the telephone wires and those of the railway company.⁴ Lumpkin, J., said: "Those who employ for the purposes of their business a palpably and highly dangerous agency, such as electricity, are bound to exercise such precautions to prevent injury to others as the emergency would reasonably seem to require."

§ 252. **The same — Five cases in Massachusetts.**— There are five cases in Massachusetts which should be read successively. In the first,⁵ a boy went upon the roof of a coal shed belonging to the defendant, without his permission, to get a ball which had lodged there. Evidence that the place was frequented by boys, and that they had been going on the roof to get balls for several years past, was excluded. There was a dynamo in an adjoining building, and two naked copper wires on the roof to conduct the current for lighting. The boy

¹ *McLaughlin v. Louisville Electric Light Co.*, 37 S. W. Rep. 851, 6 Am. EL. Cas. 255 (Ky., 1890). See also *Gremnis' Adm'r v. Louisville Electric Light Co.*, 49 S. W. Rep. 184 (Ky., 1899); *Overall v. Same*, 47 S. W. Rep. 442 (1898); *Lewis' Adm'r v. Same*, 50 S. W. Rep. 992 (Ky., 1899).

Ga. 653, 16 S. E. Rep. 203, 4 Am. EL. Cas. 378 (1892).

² *Same v. Same*, 92 Ga. 706, 19 S. E. Rep. 713.

³ *Atlanta Consol. St. Ry. Co. v. Owings*, 97 Ga. 663, 25 S. E. Rep. 377, 6 Am. EL. Cas. 271 (1896).

⁴ *Sullivan v. Boston & Albany R. Co.* (Mass., 1892), 31 N. E. Rep. 128.

⁵ *Augusta Ry. Co. v. Andrews*, 89

was killed by a shock from the wires. The court said: "If the plaintiff's intestate was not a trespasser, which we do not decide, he was at most a mere licensee, and so far as he was concerned the defendant had a right to arrange and use its property in any lawful manner, and owed him no duty with respect to it, except to refrain from setting a trap for him and from doing him intentional or wanton harm (citing cases). The live wire with which the deceased came in contact was a lawful apparatus used in the ordinary business of the defendant, and was not designed as a trap."

In the second case a standard for the support of electric wires was used in common by two corporations. It stood upon the roof of a building by permission of the owner. A lineman in the employ of one of the corporations, while engaged in making repairs, came in contact with an electric-light wire of the other, defectively insulated.¹ The court said that two persons having, in a sense, a common interest in the use of the structures, to which wires are attached, should be under the same obligation to one another, as persons having common rights to a place or passage-way, "not negligently to place a dangerous substance in the common territory where it may reasonably be anticipated that others having common rights may be injured by it." . . . "We are of opinion that the duty of the owner of the structures is to exercise reasonable care in seeing that his wires are kept, so far as practicable, in a safe condition at such places as the servants of the other are expressly or impliedly licensed to go in performing their duties with reference to the wires attached to such structures."

In another case decided on the same day the accident happened in a place where it was not intended that the linemen should go.² The structure for the common use of two companies was on the roof of one building and there was access to it through that building. A lineman, instead of using that access, attempted to cross the roof of another building and was injured by contact with an electric-light wire belonging to the defendant. The court held that the defendant owed no duty to the plaintiff to have its wires properly insulated at the place where he received his injuries, nor to have its wires supported so far

¹ *Illingsworth v. Boston Electric Light Co.*, 161 Mass. 583, 37 N. E. Rep. 773, 5 Am. El. Cas. 312 (June 22, 1894).
² *Hector v. Boston Electric Light Co.*, 161 Mass. 558, 37 N. E. Rep. 773, 5 Am. El. Cas. 300.

above the roof that the plaintiff would not come in contact with them. This case was tried a second time, and there was evidence tending to show a joint use to a greater or less extent by the two companies of the same structures throughout the city, but the court found that there was no proof of invitation or license and said: "It is not enough to show that the defendant had reasonable cause to expect that the plaintiff, in the discharge of his duty, would go, rightly or wrongly, upon roofs covered with its wires. The plaintiff was bound to go further and show that the defendant had invited or licensed him to go where he was injured."¹

On the other hand, in a case in which the plaintiff, a tin-smith, was engaged in putting up an iron pipe on the outside of the house, and it came in contact with an electric-light wire defectively insulated,² the court distinguished *Hector v. Boston Electric Light Co.*, and said: "The plaintiff was not a trespasser or mere licensee who must take the premises of another as he finds them. He was rightfully upon the premises for purposes of business. On these premises the defendant had rightly placed, as the case finds, two electric wires. These were a source of danger unless properly insulated. This fact was recognized by the defendant by insulating them. But it was negligent if it failed to use due diligence in seeing that its wires were kept in a state of repair. This duty it owed at least to every person who, for purposes of business, was rightfully upon the premises."

And in another case it was held by the same court that an electric-light company is liable for injuries from electric shock to a workman sent by the owner to repair a roof, even though the light company, in consideration of the permission to use the roof, had agreed to make all repairs.³

§ 253. A case in the United States circuit court of appeals.—The principles governing such cases are discussed by Judge Dallas in the United States circuit court of appeals for New Jersey.⁴ A pole owned by the Western Union Telegraph

¹ *Hector v. Boston Electric Light Co.* (Mass., Sept. 7, 1899), 54 N. E. Rep. 539.

² *Griffin v. United Electric Light Co.*, 164 Mass. 492, 41 N. E. Rep. 675 (1895). See also *Overall v. Louisville Electric Light Co.*, 47 S. W. Rep. 442 (Ky., 1898).

³ *Reagan v. Boston Electric Light Co.*, 167 Mass. 406, 45 N. E. Rep. 743 (1897).

⁴ *Newark Electric Light & Power Co. v. Garden, Adm'r of Mason*, 39 U. S. App. 416, 78 Fed. Rep. 74, 6 Am. El. Cas. 275 (1896).

Company was used for the wires of several companies, including the defendant. A lineman in the employ of one of these companies, stringing a telephone wire, stood on a cross-arm belonging to the defendant, and was killed by electric shock on one foot coming in contact with one of the defendant's electric-light wires. The insulation of this wire was defective just at the point of contact. The case came before the court on exceptions to a refusal to direct a verdict for the defendant. The court said: "If, in view of the facts which have been narrated, it could be unqualifiedly asserted that at the time and place of the accident Mason was wrongfully upon the separate property of the defendant, and if nothing but that bare fact should be regarded, but one conclusion could be reached; for the law is well settled that in general the right to keep his own property in such condition as the owner may see fit is not restricted by any requirement to guard against its causing injury to one who, without invitation, actual or apparent, but as a bare volunteer or mere trespasser, intrudes upon it. This limitation of the principle that no person may lawfully use even that which is his own so as to do hurt to another is not controlling in all cases, and the duty of care, which the law imposes upon those who undertake to operate such a dangerous force as electricity, may, under some circumstances, be due to one who is technically a trespasser. In such a case as this one its special facts are for consideration, and upon them, and not solely with reference to the ownership or occupancy of the *locus in quo*, the question of duty must be determined."

The court referred to *Hydraulic Works Co. v. Orr*,¹ and *Schilling v. Abernethy*,² in the supreme court of Pennsylvania, and *Union Pacific Railway Co. v. McDonald*,³ in the supreme court of the United States, and said the application of the principle upon which they were decided could not be confined to cases in which the person injured was a child. "The doctrine of all of these is that a duty of care may be due from the owner of property to one who is technically a trespasser upon it. . . . We are not attempting to lay down a rule applicable to all cases, but the principle which in our judgment is controlling in the present one is that any person who engages in a highly dangerous occupation is bound to take such pre-

¹ 83 Pa. St. 332.

² 112 Pa. St. 437.

³ 153 U. S. 262. See cases and notes in 19 Eng. Rul. Cas. 60-101.

cautions in its pursuit as a sensible man would ordinarily take to avoid doing fatal or other severe injury to one who comes upon his premises, not as a mere trespasser or positive wrongdoer, but for a purpose in itself lawful, and which the owner had reason to believe might bring him there."¹ As a matter of fact the court found that the defendant was not a mere trespasser in standing upon the cross-arm of the defendant, but that the arm presented an apparently safe footing with no risk except the invisible peril of the defective insulation of the defendant's wire. Acheson, J., dissented.

§ 254. **The same — Other cases.**—In a case in Oregon² an electric-light company having two parallel wires near together on a bridge was held liable for not giving notice that it was dangerous to touch both wires at once, even though they were insulated. The plaintiff was a servant of the owner of the bridge, employed to make repairs. The court said: "An electric company is bound to exercise the utmost care for the safety of persons liable to come in contact with wires carrying dangerous electric currents."

In a case in the court of appeals of Illinois,³ a person killed by electric shock was a customer of the electric-light company, who took hold of an electric lamp in his own house, and the allegation of negligence in permitting the wires and appurtenances to become out of repair, whereby the current escaped and became grounded, was held to be sufficient, "since the de-

¹The court referred to and distinguished a recent case in New Jersey in which it was held that a telephone company was not liable to the lineman of another company for the breaking of a cross-arm when he stood upon it, on the ground that the defendant was not bound to make cross-bars intended for supporting wires, of sufficient strength to support a man. *Speicher v. N. Y. & N. J. Teleph. Co.*, 59 N. J. Law, 23, 39 Atl. Rep. 361, affirmed 41 Atl. Rep. 1116. The doctrine of the United States supreme court with regard to "dangerous attractions" for children in the "turn-table" cases, referred to in *Union Pacific R. R. Co. v. McDonald*, has been repudiated by courts of high authority in several states.

Walsh v. Fitchburg R. R. Co., 145 N. Y. 301; *Daniels v. New York R. R. Co.*, 154 Mass. 349; *Frost v. Eastern R. R. Co.*, 64 N. H. 220; *Turess v. N. Y., Susq. & W. R. R. Co.*, 61 N. J. Law, 314, 40 Atl. Rep. 614; *D., L. & W. R. R. Co. v. Reich*, 61 N. J. Law, 635, 40 Atl. Rep. 682 (1898). *Union Pacific R. R. Co. v. McDonald*, however, was not a case of a child trespassing upon a dangerous machine of an alluring character, but the case of a concealed danger of a very serious kind in premises open to employees and their children.

²*Perham v. Portland Gen. Electric Co. (Oreg., 1898)*, 53 Pac. Rep. 14.

³*Alton Ry. & Illum. Co. v. Foulds*, 81 Ill. App. 322 (1899).

fendant was bound to exercise a high degree of skill in delivering such a dangerous element as electricity, and the injury itself furnished a presumption of negligence."¹

In New Jersey the courts hold strictly to the rule that the owner of land is not responsible for its dangerous condition to those who come upon it as trespassers or mere licensees without invitation;² but in a recent case in that state an electric-light company which had placed wires in a light and air shaft in a club-house was held liable to a mechanic making repairs to the air-shaft who was injured by electric shock by reason of defective insulation of the wires. The court said: "The second count of the declaration, to which a general demurrer has been filed, is, in my opinion, good. It sets out facts from which a duty arose from the defendant to the plaintiff, and negatives the performance of that duty. In fine, the demurrer establishes this state of facts, viz.: That the defendant used for its purposes wires that it had placed in a light-shaft, where it knew that the class of laborers to which the plaintiff belonged would enter to work; that these wires were under the control and management of the defendant, which passed through them a current of electricity dangerous to a human being; and that it failed to maintain a proper insulation of this current, whereby plaintiff, while working in the shaft, was injured. Now, the elemental rule is that whoever uses a highly destructive agency is held to a correspondingly high degree of care. Care, in this sense, means more than mere mechanical skill; it includes circumspection and foresight with regard to reasonably probable contingencies. The demurrer admits, in effect, that the defendant knew that the plaintiff would enter the shaft and work in the vicinity of its wires, and that it did not use reasonable care to render them safe, in view of their location, whereby the plaintiff was injured. A good cause of action is thus stated, and the demurrer is overruled."

In an earlier case in the same court in New Jersey,³ the servants of a street railway company, in taking down a feed wire of that company, broke a wire of an electric-light company,

¹ See, however, *Calumet Electric St. Ry. Co. v. Grosse*, 70 Ill. App. 381.

² *Anderson v. Jersey City Electric Light Co.*, 43 Atl. Rep. 654 (N. J. Sup. Ct., 1899).

³ *Newark El. L. & P. Co. v. McGilvery*, 41 Atl. Rep. 955 (N. J. Sup. Ct., 1898).

and this caused a fuse to be burned out and the wire became dead. In this condition it was handled with impunity by one of the workmen who thus broke it down. Shortly afterwards a new fuse was put in and a current was sent through the wire, and the same man touching the broken end of the wire was killed. The court said that as to persons passing along the street the electric-light company owed a duty to refrain from sending a current through the wires until it was ascertained that it was safe to do so, but that to one who had taken part in breaking down and exposing the dangerous wire, and who afterwards meddled with it, the company owed no duty until he had given him notice that the wire was broken. Their only duty was to refrain from wilful acts to his injury.

§ 255. Liability to servants — General rules.—The liability of those who maintain poles and electric wires to persons in their own employ is determined by the general rules governing the relation of master and servant. "The servant, by accepting employment, consents to take the risk of all dangers obviously or naturally incident to such employment," and the master is under a positive duty to take reasonable care and precaution not to subject the servant to other or greater dangers." He must "take reasonable care to have the tools and appliances with which and the places in and about which the servant is to be employed reasonably safe for the work the latter is employed to do."¹

One of the ordinary risks assumed by the servant is "the risk of negligence upon the part of a fellow-servant when he is engaged in the discharge of his duty" to the common master.² In the absence of statute the master is not liable to the servant for the negligence of a fellow-servant when they are engaged in a common employment;³ but the master is bound to take due care to select servants reasonably competent for the work that is to be done in common.⁴ The servant is bound to take

¹ *Essex County Electric Co. v. Kelly*, 57 N. J. L. 100, 29 Atl. Rep. 427, 5 Am. El. Cas. (1894), 360; *Harrison v. Central R. R. Co.*, 31 N. J. L. 293; *Hutchinson v. Y. N. & B. Ry. Co.*, 5 Exch. 343; 2 Shear. & Redf. on Neg. (5th ed.), § 195; *Smith, Master and Servant*, § 236; *Priestly v. Fowler*, 3 M. & W. 1, 19 Eng. Rul. Cas. 102-167.

² *Per Erle, C. J.*, in *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. at p. 296; *Farwell v. Boston & Worcester R. R. Corp.*, 4 Met. 49.

³ *Smith on Neg.* 72.

⁴ *B. & O. R. R. Co. v. Baugh*, 149 U. S. 368, at p. 385; *Webb v. Tarrant*, 18 C. B. 787; 1 Shearm. & Redf. on Neg. (5th ed.), § 191; *Smith on Neg.* 67.

due care for his own safety, and the master is not liable to him for an injury to which his own negligence has contributed.

§ 256. The same—Special and obvious dangers.—If there are special features of danger incident to the employment, the servant assumes the risk of these, if they are such as should be known to one ordinarily skilled in the employment. The young and inexperienced are entitled to expect special warning and instruction,¹ but persons of mature age assume the risk of the obvious dangers of the employment upon which they enter, even though these dangers are peculiar to this employment, or arise out of a defect in the appliances furnished by the master.²

In a case in New Jersey³ a workman climbing an electric-light pole saw that one of the steps was broken, and in coming down his foot slipped because of the broken step and he fell and was hurt. The court set aside a verdict for the plaintiff, and said that obvious dangers which are entered upon voluntarily are assumed by a servant if he continues in the service.

"The cases rigidly hold the doctrine that the servant takes upon himself such definite and determinate risks as are obvious, and no action will lie against the master for injuries to the servant in such a case."⁴

In a similar case in Indiana⁵ the same conclusion was reached. The plaintiff, in the employ of an electric-light company, was using a defective ladder, one rail of which near the top was broken off. Both master and servant knew of the defect and neither considered it dangerous. It was held that the servant could not recover damages for injuries due to the defect.

The decision of the supreme court of New Jersey was approved by the court of errors in another case,⁶ and at the same

¹ 1 Shearm. & Redf. on Neg., § 219 (5th ed.).

² Id., § 185; *Dunn v. McNamee*, 59 N. J. L. 498, 500.

³ *Foley v. Jersey City Electric Light Co.*, 54 N. J. L. 411, 24 Atl. Rep. 487 (1892).

⁴ Citing *Bayler v. Del. L. & W. R. R. Co.*, 40 N. J. L. 23; *McQuigan v. Del. L. & W. R. R. Co.*, 126 N. Y. 618; *Odell v. N. Y. Cent. R. R. Co.*, 120 N. Y. 325; *Harden v. Smithville Co.*, 29 Conn. 558; *Assop v. Yates*, 2 H. & N.

768; *Williams v. Clough*, 3 H. & N. 258; *Griffith v. Gedlow*, id. 648, distinguishing *Clark v. Holmes*, 7 H. & N. 937, where the plaintiff complained of the dangerous state of the machinery and the master promised to make it safe.

⁵ *Jenney Electric, etc. Co. v. Murphy*, 115 Ind. 566, 18 N. E. Rep. 30.

⁶ *Western Union Teleg. Co. v. McMullen*, 58 N. J. L. 155, 33 Atl. Rep. 334, 6 Am. El. Cas. 333 (1895).

time the court held that it is the duty of the master not to subject the servant without his knowledge and consent to risks not assumed by him. The plaintiff was working on a pole to which telegraph wires alone were attached, and he was injured by a current that came from highly charged electric-light wires close to the telegraph wires. The court approved a charge to the jury declaring that the plaintiff assumed "risks arising in consequence of special features of danger known to him or which he could have discovered by the exercise of reasonable care," but that the defendant was chargeable with negligence if the plaintiff was injured through some latent danger of which he should have been warned.

In a case in Missouri¹ where an experienced lineman climbed a pole and attempted in the day-time, without gloves, to connect the ends of two live wires that were obviously uninsulated, it was held that he assumed the risk of the employment, and that the company was not liable. The court said: "The employment was very hazardous in its very nature, but he undertook it with knowledge of its dangers and he was bound to exercise care to avoid the consequences."

On the other hand, in a case in New York,² it was held that it was properly left to the jury to determine whether it was contributory negligence not to wear gloves while trimming lamps in the day-time when the wires handled were dead and the shock was received through the lamp frame defectively insulated.

Again, in the United States circuit court in Indiana,³ where a lineman, in the course of his duties and by direction of an officer of the defendant, climbed a pole belonging to another company without having inspected it, it was held that he assumed the risk of its being unsound. The court said the defendant was under no duty to inspect this pole, and that the plaintiff, if he was unwilling to incur the risk, should have insisted on an inspection being made before climbing it.

§ 257. **The same — Defective appliances.**—The law requires of the master "the exercise of reasonable care and skill

¹ *Junior v. Missouri El. L. & P. Co.*, Co., 12 App. Div. 126, 6 Am. El. Cas. 127 Mo. 79, 29 S. W. Rep. 938, 5 Am. 351 (1896).
El. Cas. 369 (1895).

³ *Dixon v. West. Union Teleg. Co.*,

² *Haroun v. Brush Electric Light* 68 Fed. Rep. 630, 6 Am. El. Cas. 370 (1895).

in furnishing suitable machinery and appliances for carrying on the business for which he employs the servant, and in keeping such machinery and appliances in order, including the duty of making inspections, tests and examinations at the proper intervals.”¹ “Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity and cannot be obviated. But within such limits the master, who provides the place, the tools and the machinery, owes a positive duty to his employee with respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety;”² and, although there is judicial disagreement, the general opinion is that it is not enough that competent agents have been employed — the servant has a right to require that the precautions for his safety be taken.³ This is a duty devolving upon the master, and if he selects an agent to perform this duty for him, and the agent fails to exercise reasonable care and skill in its performance, the master is responsible for the fault.⁴ Some confusion has arisen by reason of the fact that the servant to whom this duty is delegated is often a fellow-servant of the plaintiff, for whose negligence as such the master is not liable. In such a case it has been suggested that the question turns rather on the character of the act than on the relation of the employees to each other;⁵ and also that there is a distinction between a case in which the employee’s duty to inspect is incidental to his duty to use the apparatus in common with the others, and a case in which the duty to inspect is imposed upon one who is not engaged in using the apparatus in a common employment.⁶

¹ *Union Pacific Ry. Co. v. Daniels*, 152 U. S. 684; *North German Lloyd Steamship Co. v. Ingebregsten*, 57 N. J. L. 400, 31 Atl. Rep. 618.

² *Balt. & Ohio R. R. Co. v. Baugh*, 149 U. S. 368, 387.

³ *Id.*; *North German Lloyd Steamship Co. v. Ingebregsten*, 57 N. J. L. 400, 402.

⁴ *Id.*; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642, and cases there cited; *Baily v. Rome, W. & O. R. R.*

Co., 139 N. Y. 302; *Toy v. United States Cartridge Co.*, 159 Mass. 313. See, however, *Essex County Electric Co. v. Kelly*, 47 N. J. L. 100, 104. See also *McKinley, Fellow Servants*, §§ 28, 32-35; 1 *Shear. & Redf. on Neg.*, §§ 194-195 (5th ed.).

⁵ *Balt. & Ohio R. R. Co. v. Baugh*, 149 U. S. 370-387.

⁶ *North German Lloyd Steamship Co. v. Ingebregsten*, 57 N. J. L. 400, 402. See also *Atchison, Topeka, etc.*

It is not required that the best possible appliances shall be used, but only that they shall be suitable for the work.¹ There is no implication that the work and the appliances are not of a dangerous character, but it is only required that there should be no other danger than such as is obvious and necessary.² When dangerous appliances are used there is an especial duty on both sides to take such care as the conditions require;³ and "where a servant receives an injury by reason of a latent defect in the appliances with which or the places in which he is employed, to establish the liability of the master the evidence must justify the inference that the master either knew, or by the exercise of the care and diligence required of him by the rule might have known, of the defect."⁴ A master will not be responsible for defects which could not have been discovered by the most careful scrutiny."⁵ His duty is to use ordinary and reasonable care to furnish safe and sufficient appliances and working places, and to take ordinary care at all times to keep them in a reasonably safe condition.⁶

"Dangers that are the result of common knowledge which can readily be seen by common observation the servant assumes the risk of; but when the danger to be avoided requires a knowledge of scientific facts, an ordinary servant is not presumed to have knowledge of them, and it is the duty of

R. R. Co. v. Moore, 29 Kan. 632, 644; Union Pacific R. R. Co. v. Herbert, 152 U. S. 642, 651.

¹ Van Dyke v. Atlantic Ave. Ry. Co., 67 Fed. Rep. 296; Kern v. De Castro Refr. Co., 125 N. Y. 50, 25 N. E. Rep. 1071; Harley v. Buffalo Car Mfg. Co., 142 N. Y. 31, 36 N. E. Rep. 813; Jones v. Granite Mills, 126 Mass. 841; Snyder v. Wheeling Electric Co., 43 W. Va. 661, 23 S. E. Rep. 733, 39 L. R. A. 499 (1897); 1 Shear. & Redf. on Neg., § 195 (5th ed.).

² Baltimore & Ohio R. R. Co. v. Baugh, *ubi supra*.

³ Junior v. Missouri El. L. & P. Co., 127 Mo. 79, 5 Am. El. Cas. 369 (1895); Harvin v. Brush El. Light Co., 12 App. Div. (N. Y.) 126; McAdams v. Central Ry. & Electric Co., 67 Conn. 445, 6 Am. El. Cas. 348.

⁴ Essex County Electric Co. v. Kelly, 57 N. J. L. 100; Wright v. New York Cent. R. R. Co., 25 N. Y. 562; Devlin v. Smith, 89 id. 470; Holden v. Fitchburg Ry. Co., 129 Mass. 268.

⁵ Ladd v. New Bedford Ry. Co., 119 Mass. 412; Spicer v. South Boston Iron Co., 138 id. 426.

⁶ Atchison, T. & S. F. R. Co. v. Meyers, 63 Fed. Rep. 793 (C. C. A.); Dixon v. Western Union Teleg. Co., 68 Fed. Rep. 630; New Kentucky Coal Co. v. Albani, 12 Ind. App. 497, 40 N. E. Rep. 702; North German Lloyd Steamship Co. v. Ingebregsten, 57 N. J. L. 400, 31 Atl. Rep. 619; Wood, Mas. & Serv., § 414; Smith, Mas. & Serv. 236.

the master knowing them to inform the servant in respect thereto.”¹

§ 258. **Injury by electric shock — Duty to servants — Defective appliances — Cases.**— In an action for injury to an employee by electric shock it appeared that the wires of an electric-light company were so strung that those of one circuit crossed those of another in such a manner that a slight sagging of one wire would bring two in contact and wear off the insulation, and that one circuit was maintained as a live one while the men were at work handling the wires of the other with their bare hands. The supreme court of Michigan held that this was evidence of negligence on the part of the company in view of the deadly nature of the current, and that it was properly left to the jury to determine whether the defendant was injured by a current from the defendant’s works.²

In a case in the superior court of Buffalo, New York,³ in an action for the death of an employee, caused by fire, an allegation that the fire was caused by the negligence of the defendant in not properly attaching the electric wires to a dynamo, and in their faulty and defective insulation, was held good, even though there was also an allegation that there was negligence on the part of fellow-servants in failing to put out the fire.

In a case in Nebraska⁴ the court emphasized the fact that it is not the dangerous character of the appliances, but the negligence of the defendant, that makes the cause of action. In an action by an employee it was held to be error to charge the jury that “a street railway company was bound to see that its trolley wire was reasonably safe and sound and of sufficient distance from other wires as that . . . it will not endanger the lives of persons. . . . The instructions made the case turn on the fact of danger and not on the fact of negligence. A master does not insure his servants against defective appli-

¹Chicago Edison Co. v. Hudson, Co., 82 Mich. 457, 46 N. W. Rep. 787, 3 66 Ill. App. 639. See also Myhan v. Am. El. Cas. 491 (1890).

Louisiana Electric Light Co., 41 La. Ann. 964, 17 Am. St. Rep. 436. See ³Pzepka v. American Glucose Co., 11 Misc. Rep. (N. Y.) 181, 5 Am. El. Cas. 366 (1895).

10 Am. & Eng. Ency. of Law (2d ed.), 869-872.

⁴Lincoln Street Ry. Co. v. Cox, 49 Neb. 807, 67 N. W. Rep. 740, 6 Am. El. Cas. 352 (1896).

²Kraatz v. Brush Electric Light

ances. He is not chargeable at all events because the appliances are defective. He is liable only when he has been negligent in the matter." But in the supreme court of New York¹ it was held that the reasonable care required is measured by the danger of the forces employed.

In the supreme court of errors of Connecticut,² where a lineman climbing a pole received a shock because a span wire supposed to be insulated had come in contact with a trolley wire, another wire at the same moment becoming grounded, the defendant's attention having been called a few days before to the dangerous condition of the wires at this point, the court said: "When the legislature authorizes a corporation to use such an agency (as electricity in a trolley wire) in the public streets, the law implies a duty of using a very high degree of care in the construction and operation of the appliances for the use of that agency, requiring the corporation to employ every reasonable precaution known to those possessed of the knowledge and skill requisite for the safe treatment of such an agency, for providing against all dangers incident to its use, and holds it accountable for the injury to any person due to the negligence of that duty, whether the person is or is not one of its own employees. This standard of duty was correctly applied to the facts as found by the court below. The method of construction in connection with the failure to insulate the span wire was a violation of the duty imposed on the defendant by law."

§ 259. Duty to servants—Defective poles and wires—Cases.—In a case in Louisiana,³ where a lineman standing on the cross-arm of a pole was thrown down by the breaking of a wire which other men were drawing taut, the court found the accident was due to a defect in the wire, which was sufficiently proved by the fact of its breaking, there being no proof that it was subjected to an extraordinary strain; and it was held that the servant engaged in a dangerous employment had a right to assume that the appliances were sound, and that the

¹ Harroun v. Brush Electric Light Electric Co., 27 Conn. 445, 35 Atl. Rep. Co., 12 App. Div. (N. Y.) 126, 42 N. Y. 341, 6 Am. El. Cas. 348 (1896).
Supp. 716, 6 Am. El. Cas. 357 (1896).

² McAdam v. Central Railway & Co., 40 La. Ann. 178, 3 S. Rep. 625, 2 Am. El. Cas. 344 (1888).
³ Clairain v. Western Union Teleg.

master was bound to use the greatest care in the selection of the necessary materials.

It has been held, however, that the linemen have no right to assume that the cross-bars are strong enough to bear their weight, and that if they use them in climbing, or rest their full weight upon them, they do so at their own risk. They know that the purpose of the bars is to carry the wires. The duty of the company to use due care to have them in good condition is limited to this purpose, and it is open to the men to determine for themselves whether they are strong enough to bear their weight. They must rely upon their own inspection and take the risk themselves. Such was the decision of the New York court of appeals in the case of a servant of the defendant company;¹ and of the New Jersey supreme court in the case of the lineman of another company making use of a pole.²

§ 260. The same—Duty of inspection.—With regard to the duty of the master in respect to the condition of the appliances furnished, I have already quoted the opinion of the supreme court of New Jersey in *Essex County Electric Co. v. Kelly*.³ This was a case in which the lineman of an electric-light company was directed to take down a pole and set it up in another place. The pole fell as he was taking it down, and when he had set it up again he climbed to the top and drew the wires taut with a "strap and vise." The pole broke under the strain and Kelly was hurt. The court said there was no doubt that under the evidence the breaking of the pole was due either to the fact that it was rotten at the core or that it had been weakened by its previous fall, but that in either case the liability of the company was not made out. In the latter case the weakness was due to a fact within the knowledge of the plaintiff, and he climbed the pole without making the fact known to the company; and in the former case the defect was one which the most rigid scrutiny would not have disclosed, and there was not sufficient evidence of the failure to make inspection. The duty of the company was

¹ *Flood v. Western Union Teleg. & P. Co. v. Garden*, 39 U. S. App. 416, Co., 131 N. Y. 603, 30 N. E. Rep. 196, 78 Fed. Rep. 74, 6 Am. El. Cas. 275 4 Am. El. Cas. 402 (1892). (1897).

² *N. Y. & N. J. Teleph. Co. v. 357 N. J. L. 100, 29 Atl. Rep. 427, Speicher*, 59 N. J. L. 23, 39 Atl. Rep. 5 Am. El. Cas. 360 (1894); § 257, 661 (1896). Compare *Newark El. Light supra*.

“that of taking reasonable care to have this pole when erected, and to keep it after erection, of sufficient strength. It is a duty of reasonable inspection and examination. That there was a failure to perform the duty is not made out either by direct proof or any justifiable inference.” Upon a new trial there was proof that proper inspection had not been made and a verdict for the plaintiff was sustained.¹ The judgment was affirmed by the court of errors.²

The supreme court seems to have overlooked the fact that it declared on the first trial that the defect was one which the most rigid scrutiny would not have disclosed.

In a case in the United States circuit court of appeals³ it was held that an instruction that it is the duty of an electric-light company having poles in the streets to make such inspection of them “from time to time as will determine and ascertain whether decay has taken place to such an extent as to render the timber unfit for use” is misleading where the defect shown by the evidence was not visible from the outside, because it seems to require that the inspection must be effective, and goes beyond the requirement of reasonable and ordinary care.

§ 261. *The same — Other cases.*— So also in New York, where a pole on which a man was working was jarred by the breaking of an eye-bolt by which a wire had been held taut, it was shown that the eye-bolt had been purchased from a reputable firm and appeared to be sound, but this particular one was welded, and parted at the place of welding. It had been put in the pole by a fellow-servant of the plaintiff engaged in the same occupation. The court said the negligence, if any there was, in putting in this eye-bolt, was that of the plaintiff's fellow-servant. A master is not bound to furnish the best known and conceivable appliances. He is required to furnish such as are reasonably safe. He is required to be reasonably prudent in selecting tools or machinery. Having ordered this eye-bolt “from responsible and well-known manufacturers, he had a right to assume that it was properly made. Having acted as an ordinary man would under similar circumstances, he cannot be held to have been negligent.”⁴

¹ *Essex County Electric Co. v. Kelly*, 60 N. J. L. 306, 37 Atl. Rep. 619.

² *The Same*, 61 N. J. L. 289, 41 Atl. Rep. 1115 (1897).

³ *Denver v. Sherrett*, 88 Fed. Rep. 226, 31 C. C. A. 499 (1898).

⁴ *Doyle v. White*, 14 Misc. Rep. (N. Y.) 417, 35 N. Y. Supp. 760. *Af-*

A declaration was held good on demurrer which alleged that a lineman engaged in the course of his duty in climbing a pole to remove wires was using due care and was thrown from the pole and fatally injured by reason of the negligence of the defendant in having a rotten and insecure pole, the defect in which was concealed from him and was unknown to him.¹

§ 262. Defective appliances—Risks of employment—Duty of servant.—On the other hand, the rule is well settled that the servant assumes the risks ordinarily incident to his employment, and such dangers as are apparent in the appliances as he finds them.² He is not entitled to the best appliances, but only to such as are reasonably fit for the purpose for which they were intended;³ and with respect to appliances in his custody or under his observation in the course of his duty, he must use due care to observe their condition, and cannot assume that they will not become defective.

With regard to an electric lamp, for example, it has been held that a servant removing a lamp from a pole, knowing that all lamps of this pattern were being removed and new ones put in their places, took the risk of injury by reason of the defective condition of the lamp. The court said: "He must assume that the lamp might be out of order and govern his actions accordingly. The defendant is not negligent, having done all the law required, namely, the furnishing of proper appliances and competent workmen for the performance of the work."⁴

And in Illinois it was held that one engaged as a lineman in removing wires from one set of poles to another assumes the risk growing out of the evidently insecure and defective condition of the poles.⁵

firmed, 9 App. Div. 521, 41 N. Y. Supp. 628 (1896). Cited in *Hesketh v. N. Y. C. & H. R. R. Co.*, 55 N. Y. Supp. 898-915 (1899).

¹ *Western Union Teleg. Co. v. Jenkins*, 92 Ga. 398, 17 S. E. Rep. 620, 6 Am. El. Cas. 405 (1893).

² *Pierce v. Camden, G. & W. Ry. Co.*, 58 N. J. L. 400, 6 Am. El. Cas. 377; *Windover v. Troy City Ry. Co.*, 4 App. Div. (N. Y.) 202, 6 Am. El. Cas. 381.

³ *Atlantic Ave. Ry. Co. v. Van Dyke*, 72 Fed. Rep. 458, 38 U. S. App. 334, 6 Am. El. Cas. 394; *Doyle v. White*, 14 Misc. Rep. (N. Y.) 417, 35 N. Y. Supp. 760; *Wood, Mast. & Serv.* 427, 2d ed.

⁴ *Gibbons v. Brush Electric Illum. Co.*, 36 App. Div. (N. Y.) 140, 55 N. Y. Supp. 378 (1899).

⁵ *Peoria General Electric Co. v. Gallagher*, 68 Ill. App. 248 (1896).

Where an experienced lineman attaching wire to a pole felt a current and told the foreman the current was too strong and was assured that it was not, and then felt it again himself and went on with his work without complaint, and afterwards was injured by shock, it was held in Missouri that his claim that he relied on the foreman's assurance was not sustained.¹

A lineman's spurs set at a wrong angle and made of material so soft that it will bend under a man's weight are defective appliances, and the defects are not such as ought to be known to an inexperienced servant required to use them outside of his regular employment.²

Dangerous irregularity in the location of the poles of a street railway constitutes a defect in the appliances of the company; and if a conductor is injured while collecting fares by striking a pole set unusually near the track, it may be left to the jury to determine whether the danger was so well known to him that he accepted this as one of the risks of his employment.³

§ 263. **The same — Appliances not furnished by the master.**— As a general rule it is only appliances furnished by the master for which he is responsible. The servant takes the risk of the condition of other appliances made use of by him in the course of his employment. It has been held, for example, that a telephone company is not responsible to a lineman for the breaking of the limb of a tree which he climbed for the purpose of stringing the company's wires upon it;⁴ and also that a railroad company is not responsible to the servant of an electric-light company for the condition of poles belonging to the former company on which he was stringing wires for the latter; but in the same case it was held that the electric company owed its servant the duty of inspecting the poles of the railroad company on which its line was strung, and which it re-

¹ Epperson v. Postal Tel. Cable Co. (Mo.), 50 S. W. Rep. 795 (1899).

² Indiana Natural & Illum. Gas Co. v. Marshall (Ind. App.), 52 N. E. Rep. 232 (1898), citing cases on the duties of master and servant with respect to appliances.

³ Pierce v. Camden. G. & W. Ry. Co., 58 N. J. Law, 409, 35 Atl. Rep. 286, 6 Am. El. Cas. 377 (1896); Sundry v. Savannah St. R. R. Co., 96 Ga. 819, 23 S.

E. Rep. 841, 6 Am. El. Cas. 394 (1895); Whipple v. New York, H. & N. H. R. R. Co., 19 R. I. 587, 35 Atl. Rep. 305; Crandall v. Same, 19 R. I. 394, 35 Atl. Rep. 307, 6 Am. El. Cas. 394 (1896); Pikesville R. & E. G. R. R. Co. v. State, 42 Atl. Rep. 214, 6 Am. El. Cas. 394 (Md., 1898).

⁴ Yearsley v. Sunset Teleg. & Teleph. Co., 110 Cal. 236, 42 Pac. Rep. 638, 6 Am. El. Cas. 368 (1895).

quired him to use;¹ and a distinction was made between this case and one in which a servant incidentally, in the course of his employment, was required to climb a pole belonging to another company, and this was held to be one of the risks of his employment.²

§ 264. **Contributory negligence — Cases.**— The liability of those who maintain poles and wires to persons injured by reason of their negligence in constructing, maintaining or operating their lines is subject to the limitation that the plaintiff himself must exercise due care. The principle is a familiar one, and the application of it depends upon the circumstances of the particular case. It is enough to give examples of the application of it to cases relating to poles and wires.

It has been held that a man driving a clumsy vehicle who comes upon a wire hanging low across a crowded street is not guilty of contributory negligence because, on being suddenly confronted with an emergency, he made an error of judgment, turning the wrong way;³ that the failure of a person walking in the street in the day-time to notice an electric wire on the sidewalk is not to be held contributory negligence as a matter of law;⁴ that a man repairing a roof on which there is an electric wire which he must either step over or stoop under, is not negligent in doing either the one or the other, if the wire is apparently properly insulated;⁵ that under the circumstances of the case there was no evidence of contributory negligence on the part of a boy who picked up a wire which was lying on the sidewalk and was heavily charged with electricity;⁶ that under other circumstances it was a question for the jury whether or not a boy was negligent in picking up and throwing away from him a broken wire against which he had been warned;⁷ and again, that it is negligence for an intelligent boy

¹ San Antonio Edison Co. v. Dixon, 42 S. W. Rep. 1009 (Tex. Civ. App., 1897).

² Dixon v. Western Union Teleg. Co., 68 Fed. Rep. 630, 71 Fed. Rep. 143 (1895). Cf. Newark Electric L. & P. Co. v. Garden, 78 Fed. Rep. 74, 39 U. S. App. 416.

³ Williams v. Louisiana El. Light & Power Co., 43 La. Ann. 295, 8 S. Rep. 938, 3 Am. El. Cas. 479 (1891).

⁴ Brush Elect. Lighting Co. v. Kelley, 126 Ind. 220, 25 N. E. Rep. 813 (1890).

⁵ Clements v. Louisiana Electric Light Co., 44 La. Ann. 692, 11 S. Rep. 51, 4 Am. El. Cas. 381 (1894).

⁶ Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. Rep. 344, 5 Am. El. Cas. 264 (1894).

⁷ Texarkana Gas & Electric Light Co. v. Orr, 59 Ark. 215, 27 S. W. Rep. 66, 5 Am. El. Cas. 272 (1894).

seventeen years of age to take hold of a fallen electric wire after he has been told that it is dangerous, and especially when he showed by wrapping his handkerchief around his hand that he knew there was danger in touching the wire;¹ and that it is not contributory negligence for a policeman on duty to attempt to remove a dangerous wire from the street with his mace.² In a case in Massachusetts it was left undecided whether an experienced lineman standing on a copper roof was negligent in stooping under a group of wires which he knew might be dangerous, and so coming in contact with another group of dangerous wires which he might have seen but did not notice.³

§ 265. **The same — Other cases.**—In another case in the same court it was held to have been properly left to the jury to say whether a workman, not the servant of the defendant, was negligent in not seeing that the wires among which he was working were not properly insulated at a certain point, or in letting his pliers get caught upon a wire.⁴ In a case in California⁵ it was held not to be error to refuse to charge the jury “that the public are presumed to know enough of the dangers of electricity to avoid the dangers which arise out of its practical use.” The degree of care required, the court said, depends upon the knowledge and intelligence of the person. The plaintiff is only required to use “such care as a man in his condition in life would ordinarily exert under the circumstances.”

In Virginia an experienced lineman searching for an open current, and knowing that the current for good reasons was turned on, was held to be guilty of contributory negligence in grasping the shunt cord at the end which he knew to be uninsulated, and grasping at the same time the uncovered end of the line wire.⁶ But where an inexperienced man was sent to remove lamps from a circuit, and the current was turned

¹ *Framenthal v. Gas Light Co.*, 67 Mo. App. 1 (1897).

² *Dillon v. Allegheny County Light Co.*, 179 Pa. St. 482, 36 Atl. Rep. 164, 6 Am. El. Cas. 242 (1897).

³ *Hector v. Boston Electric Light Co.*, 161 Mass. 558, 37 N. E. Rep. 773, 5 Am. El. Cas. 300 (1894).

⁴ *Illingsworth v. Boston Electric Light Co.*, 161 Mass. 583, 37 N. E. Rep. 778, 5 Am. El. Cas. 312 (1894). See

also *Griffin v. United Electric Light Co.*, 164 Mass. 492, 41 N. E. Rep. 675, 6 Am. El. Cas. 252 (1895); *Reagan v. Boston Electric Light Co.*, 107 Mass. 406, 45 N. E. Rep. 743 (1897).

⁵ *Giraudi v. Electric Improvement Co.*, 107 Cal. 120, 40 Pac. Rep. 108, 5 Am. El. Cas. 318 (1895).

⁶ *Piedmont Electric Illum. Co. v. Patteson's Adm'x*, 84 Va. 747, 6 S. E. Rep. 4, 2 Am. El. Cas. 350 (1888).

on earlier than usual, and he was injured by electric shock, it was held in Colorado that a nonsuit was properly refused, and that the questions of negligence and contributory negligence were properly left to the jury.¹

Where a policeman was found dead at the foot of an electric lamp post around which was coiled an uninsulated wire, and there was evidence of electric shock, it was held in New Jersey that the mere fact that he came in contact with such a wire was not evidence of contributory negligence. The court said there was no evidence that he knew it was charged with electricity, and that he had a right to presume that the line was so maintained as not to be a source of danger to persons in the street.²

And in Kansas it was held that the fact that a live wire is emitting sparks, apparently jeopardizing a building, will not preclude the owner from attempting, with ordinary prudence, to remove the wire and relieve his property from danger, and that such an attempt is not, as a matter of law, contributory negligence.³

So, also, in Pennsylvania it was held that a policeman on duty, who on a rainy night attempts to remove with his mace from a street on his beat a broken wire hanging from a pole, knowing it to be charged with electricity, is not necessarily guilty of negligence;⁴ and in Massachusetts the question of the negligence of a person in the street who was struck by a switch stick which flew from the hands of the conductor of an electric car was held to have been properly left to the jury.⁵

§ 266. Injury from electric shock — Joint negligence — Proximate cause.—In many cases of injury by electric shock, the accident is due to the joint negligence of persons or companies maintaining two different lines of electric wire. If the negligence of both contributes directly to the injury, there is no doubt that both are jointly and severally liable; but there

¹ Colorado Electric Co. v. Lubbers, 11 Colo. 505, 2 Am. El. Cas. 361 (1888).

² Suburban Electric Co. v. Nugent, 58 N. J. Law, 638, 34 Atl. Rep. 1069 (1896).

³ Leavenworth Coal Co. v. Ratchford, 5 Kan. App. 50, 48 Pac. Rep. 927.

⁴ Dillon v. Allegheny County Light Co., 179 Pa. St. 482, 36 Atl. Rep. 164 (1897).

⁵ Manning v. West End St. Ry. Co., 166 Mass. 230, 44 N. E. Rep. 135, 6 Am. El. Cas. 329 (1896).

are cases in which the negligence of one is the remote, and that of the other the proximate, cause, or in which there is a question as to which is the proximate cause—whether both are direct and efficient causes, or whether the negligence of one is too remote to be the ground of liability.

The subject of proximate cause is discussed in a case in which the immediate cause was not the electric current of another company, but that which came from the clouds in a thunderstorm, and it was held that a telephone company was liable for a shock to the plaintiff from contact with a wire hanging low in the street and charged with electricity by reason of the storm.¹ The court, referring to the rule laid down by the United States supreme court in *Insurance Co. v. Tweed*,² said: "The new force or power here would have been harmless but for the displaced wire, and the fact that the wire took on a new force with the creation of which the defendant was not responsible; yet it contributed no less directly to the injury on that account."

In *Ahern v. Oregon Telephone Co.*³ the defendant had by permission strung a wire upon the pole of an electric-light company, and afterwards, when the wire was no longer used, instead of removing it, the defendant wrapped it around an electric-light pole, and then the electric-light company took down this pole and hung the wire on another pole so that the end of it came near the sidewalk. Here it became charged with a current from an electric-light wire and injured the plaintiff. It was shown that the telephone wire was harmless in itself, and that the current was that of the electric-light company, and that the defendant had no knowledge that that company had removed the pole and wire; but the court held that the defendant, having the wire where it had no right to be, and having left it in the street and knowing that there was danger of its being charged with a dangerous current of electricity, was bound to look after it and see that it did not become dangerous to travelers. Although the current came from the other company's wire, yet without the defendant's wire the current would not

¹ Southwestern Teleg. & Teleph. Co. v. Robinson, 50 Fed. Rep. 810, 4 Am. El. Cas. 342 (1892).

² 7 Wall. 52.

³ 24 Oreg. 276, 33 Pac. Rep. 403, 4 Am. El. Cas. 349 (1893); affirmed on motion for a rehearing, 35 Pac. Rep. 549 (1894).

have reached the plaintiff; and although there was an intervening cause, yet the defendant's negligence contributed directly to the injury. A verdict for the plaintiff was sustained.¹

The questions of proximate cause and joint liability arose in a case in the supreme court of New York.² A telegraph company controlled a line of wires either as lessee or licensee, and used it jointly with another company. An insulator used by the other company, set loosely on a peg, was thrown down by the act of a lineman employed by the city. The danger of the loose insulator being thrown off was held to be not so remote that the jury could not fairly find that it might reasonably be anticipated. The defendant was held chargeable with the safety of the pole because of its control of the line, even though it were a lessee or even a licensee; and the fact that but for the act of the city's lineman the injury would not have occurred was held not to relieve the defendant from liability, because the case came fairly within the rule that "when several proximate causes contribute to an accident, either of which is an efficient cause, without which the accident would not have happened, it may be attributed to any or all of them."

The same rule was applied in a case in Montana where a horse, becoming frightened, ran into and broke a guy wire so placed as to be dangerous, and the broken wire, recoiling, dragged the plaintiff from her horse, and she was injured. The court held that if the obstruction in the street contributed to the injury, and the shying of the stranger's horse was not the sole cause, then the defendant was liable.³

§ 267. The same—Guard-wires.—Where a trolley-wire was lawfully suspended over a street and was unprotected by guard-wires, and the plaintiff's horses were injured by electric shock through a telephone wire which was broken by a storm and fell upon the trolley-wire, it was held in New York that the proximate cause of the injury was the falling of the telephone

¹On the question of proximate cause the court cited *Railway Co. v. Kellogg*, 94 U. S. 475; *Insurance Co. v. Tweed*, 7 Wall. 52; *Southwestern Tele. & Teleph. Co. v. Robinson*, 50 Fed. Rep. 810, 4 Am. El. Cas. 342, *supra*.

²*Quill v. Empire State Teleph. &*

Teleg. Co., 13 Misc. Rep. (N. Y.) 435, 92 Hun, 539, 34 N. Y. Supp. 470, 37 N. Y. Supp. 1149, 6 Am. El. Cas. 303 (1895).

³*Lundeen v. Livingston Electric Light Co.*, 17 Mont. 32, 41 Pac. Rep. 995, 6 Am. El. Cas. 322 (1895).

wire, and that the electric railway company was not liable.¹ The court said: "The construction and operation of the defendant's railroad by a single trolley power was not the direct, necessary and natural cause of the injury complained of. But for the occurrence of other events over which the defendant had no control, the injury could not have happened."

In a case in Tennessee, where the wires of a telephone company had plainly become impaired where they crossed the wires of an electric railway and there was no guard-wire between them, and the immediate cause of the fall of the telephone wire was the breaking of a pole by a burning building, it was held that both companies were liable to one whose horse was struck by the telephone wire and killed by the electricity from the trolley wire. The court said that both companies were under obligation to keep the highway reasonably safe; both knew of the unsoundness of the telephone wire and of the danger of its contact with the unprotected trolley wire, and both were liable for the failure to guard against this danger.²

This decision was approved and followed by the supreme court of Alabama. The plaintiff complained that his horse was killed by a shock received from a telephone wire which had fallen upon a trolley wire. The railway company answered, setting up its right to maintain and operate the trolley wire with a dangerous current, and the telephone company also answered, insisting that it was the duty of the railway company to prevent contact with its dangerous wire in case a telephone wire should fall. Demurrers to both of their answers were sustained. It was held that the companies were jointly liable for suffering the wire, after falling, to remain in contact with the dangerous wire.³

§ 268. **The same — Continued.**— In a case in Arkansas, where a telephone wire suspended above a trolley was broken and was allowed to remain for several days with an end in the street, and a boy, stepping on it, was injured by electric shock, in an action against the owner of the telephone wire and the

¹ *Albany v. Watervliet Turnpike & R. R. Co.*, 76 Hun, 136, 27 N. Y. Supp. 848, 4 Am. El. Cas. 367 (1894). With regard to the precautions to be used for keeping telephone wires from contact with heavily charged wires, see *Nebraska Teleph. Co. v. New York*

Gas & El. Lt. Co., 17 Neb. 284, 43 N. W. Rep. 126, and ch. XIII, § 213, *supra*.

² *United Electric Co. v. Shelton*, 89 Tenn. 423, 14 S. W. Rep. 863 (1890).

³ *McKay v. Southern Bell Teleph. etc. Co.*, 111 Ala. 337, 19 S. Rep. 695, 6 Am. El. Cas. 223 (1896).

street railway company the jury found both guilty of negligence—the former in permitting the wire to remain down, and the latter in allowing it to become charged with electricity. The court said: “If this be true, the injury was the result of the concurring negligence of the two parties, and would not have occurred in the absence of either. In that case the negligence of the two was the proximate cause of the same, and both parties are liable.¹ It was also held that the facts warranted the inference that the telephone wire received the dangerous current from the trolley wire, although there was no evidence of actual contact. There was a similar decision in the Maryland court of appeals in a later case.² A telephone wire had broken and fallen across the insulated feed-wire of an electric railway, and remained for two weeks in such a position as to wear off the insulation, and it was held that the facts justified the inference that the current which killed a man who touched the telephone wire came from the feed-wire, and a judgment against both companies was sustained.

In the United States circuit court of appeals in New Jersey,³ where a boy was injured by shock from a telegraph wire which had broken and fallen across an electric-light wire and become heavily charged, evidence of the condition of the wire nine months after the accident, and that there was then no guard-wire, was held admissible as shifting the burden of proof, and it was held that the questions of negligence and of proximate cause were properly left to the jury. Quoting Mr. Justice Strong in a case in the supreme court,⁴ Judge Wales said: “The question always is: Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?”

¹ *City Electric St. Ry. Co. v. Conery*, 61 Ark. 381, 33 S. W. Rep. 426, 6 Am. El. Cas. 217 (1895).

² *Western Union Tel. Co. of Baltimore City v. State*, 82 Md. 293, 33 Atl. Rep. 763, 6 Am. El. Cas. 210 (1896). See also *Kankakee Electric Ry. Co. v. Whittemore*, 45 Ill. App. 484, 4 Am. El. Cas. 362, as to negligence of street

railway company in allowing trolley pole to break a telephone wire so that it fell upon the trolley wire.

³ *Western Union Tel. Co. v. Thorn*, 28 U. S. App. 123, 64 Fed. Rep. 287, 5 Am. El. Cas. 283 (1894).

⁴ *Railway Co. v. Kellogg*, 94 U. S. 469.

§ 269. **The same — Continued.**— Although the absence of guard-wires may be an element of negligence, yet it cannot be said as a matter of law that either or both of two companies maintaining different lines of wires in the same street are bound, in the absence of statute or ordinance, to maintain guard-wires for the purpose of preventing the harmless wires of the one from coming in contact with the dangerous wires of the other. In the case in New York above referred to¹ the court said there was no evidence “that guard-wires were either necessary or usual in the construction of single trolley lines for propelling street cars;” and in a recent case in the court of errors of New Jersey² it appeared on the trial that there was a difference of opinion among experts as to whether prudence requires the use of guard-wires or not, and it was held that it was properly left to the jury to determine whether the failure to use guard-wires was negligence. In this case the court said that the defendants, a telephone company and a street-railway company, were “each maintaining wires in a public highway in the exercise of a franchise, not of an easement; hence each was bound to take reasonable care not to injure other users of the streets,” and that “in the use of a powerful electric current in the streets reasonable care is great care,” and a verdict against both companies was sustained.

In the supreme court of Wisconsin, in an action against a street-railway company, the court said: “In the present condition of the science and of the practical knowledge on this subject, it cannot be said, as a matter of law, what method of guarding the wires shall be required, or whether any guards shall be required, for it is not known to the law that any method now known will be effective. But it is a question for the jury, under all the facts in the case, to determine whether the method actually used was negligent.”³

If the dangerous wire of the electric-railway company is law-

¹ § 267, note 1.

² New York & N. J. Teleph. Co. v. Bennett, 62 N. J. L. 742, 42 Atl. Rep. 759 (1899).

³ Block v. Milwaukee St. Ry. Co., 89 Wis. 371, 61 N. W. Rep. 1101, 5 Am. El. Cas. 293. The court said that this decision was in no way inconsistent

with its own decision in *State ex rel. Wisconsin Teleph. Co. v. Janesville St. Ry. Co.*, 87 Wis. 72, 57 N. W. Rep. 970, 4 Am. El. Cas. 289, in which it was held that a municipal ordinance requiring the use of guard-wires was reasonable and might be enforced by *mandamus*.

fully in the street and in its proper place, and no provision is made by state or local authorities that the railway company shall put up guard-wires, it is the duty of those who maintain other wires above and across the line to take great care to prevent them from falling upon a wire that is known to be dangerous, and the cases in which the railway company has been held liable are those in which it has been found guilty of negligence in not taking due precaution against accidents that might reasonably be anticipated, or in which it has permitted dangerous conditions or actual contact to continue, and so, with knowledge of the danger, has continued to discharge a dangerous current with injurious effect.

§ 270. Joint negligence—Proximate cause—Conclusions.

These cases serve as examples of the questions that arise with regard to the liability for injuries arising out of the joint use of the streets for various kinds of electric wires. The principles to be applied are derived from cases that may have no reference to electric wires, and they are discussed in the text-books upon the law of torts, of damages, or of highways, and may be traced in the collections of leading cases upon these subjects.

The subject of proximate cause is involved in every case where two or more persons are alleged to have contributed more or less directly to an injury, and where this injury arises from the use of a dangerous thing in a public street the principles governing the rights and duties of those who use the highways are involved. The subject of proximate cause is carefully considered in the last edition of Shearman & Redfield on Negligence. The breach of duty, they say, must be the proximate cause, and the injury must have come in natural and continuous sequence, and they discuss the question of foreseen and unforeseen consequences, and how far and when an intervening cause breaks the sequence and relieves the person from liability for the actual result, and conclude that it is only when it is either a superseding or a responsible cause. If it supersedes the original cause, it is no matter whether it is intelligent or not; but if it does not supersede it, then the first party is not relieved unless the intervening cause was the culpable act of a free agent.¹

¹ Shearm. & Redf. on Neg., 26. See *guard on Torts*, rules 22-26; *Bar-*
also Pollock on Torts, pp. 26-30; *rows on Neg.*, 17; *Buswell on Per-*
Cooley on Torts, §§ 68, 69; 1 *Jag-* *sonal Injuries*, 154; *Thompson on*

§ 271. Negligence — *Res ipsa loquitur*.— When injuries are caused by the use of electric wires in the streets, the question often arises whether the happening of the accident is of itself *prima facie* evidence of the negligence of the person in control of the wires. If the duty is to insure against injury, then the injury is undoubtedly *prima facie* proof of a breach of the duty; but even when the duty is only to exercise great care in view of the danger, there are cases in which the fact that harm was done is evidence of the want of such care. Except in cases in which the defendant is charged with the duty of an insurer, it is always incumbent on the plaintiff to establish negligence on the part of the defendant; but there are cases in which the facts which prove the accident also speak of the negligence of the defendant, and throw upon him the burden of explaining them, and showing that the accident is due to some other cause than his want of care. In such cases the courts apply the maxim *res ipsa loquitur*. This can only be applied, however, when the accident is such that the natural and reasonable inference is that it would not have happened but for the neg-

Neg. 1085; 8 Am. & Eng. Ency. of Law, 561-582 (2d ed.), title "Damages," where the conclusions are stated and many cases are cited. The leading cases on *legal cause* are collected in 2 Ames & Smith's Select Cases on Torts, ch. I. Among these are *Lords of Romney Marsh v. Trinity House*, L. R. 5 Exch. 204; *L. R. 7 Exch. 247*; *McDonald v. Snelling*, 14 Allen (Mass.), 290; *Scott v. Shepherd*, 2 Wm. Black. 892; *Gilman v. Noyes*, 57 N. H. 627; *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469; *Smith v. London & S. W. Ry. Co.*, L. R. 6 C. P. 14; *Harrison v. Berkley*, 1 Strob. Law (S. C.) 525; *Wiley v. West Jersey Ry. Co.*, 44 N. J. L. 247; *Alexander v. New Castle*, 115 Ind. 51; *Binford v. Johnston*, 82 Ind. 426; *Fergus Lane v. Atlantic Works*, 111 Mass. 136; *Mars v. Delaware & Hudson Canal Co.*, 54 Hun (N. Y.), 625; *Mathews v. London Street Tramways Co.*, 6 Law Times Rep. (N. S.) 47. See also *Kansas City v. File*, 55 Pac. Rep. 877; *Wood v.*

Diamond Electric Co., 185 Pa. St. 529, 39 Atl. Rep. 1111, where it was held that the negligence of an electric company was not the proximate cause of the death of one who touched a heavily charged screen with full notice of its condition. *Twist v. Rochester*, 37 App. Div. 307, 55 N. Y. Supp. 850-857; affirmed, 39 App. Div. 635, 57 N. Y. Supp. 1149, where the defendant's wire, falling upon a trolley wire, was afterwards pulled down by others so as to strike the plaintiff in the street. Compare *Lynch v. Nurdin*, 1 Q. B. 29; *Thomas v. Winchester*, 6 N. Y. 397; *George v. Skivington*, L. R. 5 Exch. 1; *Heaven v. Pender*, 11 Q. B. Div. 503; *Elliott v. Hall*, 15 Q. B. Div. 315; *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. L. 17; *Lane v. Atlantic Works*, 107 Mass. 104; *Clark v. Chambers*, 3 Q. B. Div. 327, 19 Eng. Rul. Cas. 28. In this last case it must be observed that the dangerous article used in the highway was placed there unlawfully.

lect of duty on the part of the defendant, or when it appears that the facts are so far within the exclusive knowledge of the defendant that it is reasonable to call upon him for an explanation of the injury; and it must always be remembered that it is a general rule of law that the mere proof of the occurrence of an accident raises no presumption of negligence.¹

§ 272. **The same — Cases.**—The maxim has been applied where injuries have been caused by the falling of electric apparatus set up in the street, or from the escape of the electric current when it could not well have escaped without the fault of the defendant.

In a case in Massachusetts² a piece of iron forming part of the overhead apparatus of an electric railway fell upon a traveler in the street. It was held not to be error to charge the jury that although the plaintiff must prove negligence, yet if nothing else appeared it would be competent to find negligence on proof of the manner in which the accident occurred. The court said: "No one but the defendant was responsible for the safety of its apparatus. . . . If the defendant should offer no explanation of the breaking, and no evidence that it had taken pains to make the apparatus safe, the only proper inference would be that it had not taken reasonable care to make the apparatus safe, and the jury should find negligence on its part."

The maxim was referred to in a case in the New York supreme court. A man working on a roof received a shock from electric-light wires of which the insulation was defective. The need of making proof of negligence was recognized, but the question was suggested whether the happening of the accident did not carry with it an imputation of negligence, since

¹ *Bahr v. Lombard, Ayres & Co.*, 53 N. J. Law, 233, 21 Atl. Rep. 190, 23 Atl. Rep. 167. As to the meaning and application of the maxim *res ipsa loquitur*, see § 232, *supra*, and the cases there cited. And see also Pollock on Torts, 422; Smith on Negligence, *248; Ray on Negl. Imp. Duties, ch. IX; Article in 10 Chicago L. J. 261; 2 Jaggard on Torts, 864; Shearm. & Redf. on Negl., § 59; Scott v. London & St. Katharine's Dock Co., 3 H. & C. 596

(1865); *Kearney v. London B. & S. C. Ry. Co.*, L. R. 6 Q. B. 759 (1871); *Mullen v. St. John*, 57 N. Y. 567; *Tarry v. Ashton*, 1 Q. B. Div. 314; *Sheridan v. Foley*, 58 N. J. Law, 230, 33 Atl. Rep. 484.

² *Ugla v. West End St. Ry. Co.*, 160 Mass. 351, 35 N. E. Rep. 126, 4 Am. El. Cas. 389 (1894).

³ *Ennis v. Gray*, 87 Hun, 355, 34 N. Y. Supp. 379, 5 Am. El. Cas. 325 (1895).

it was evident that if the wires had been properly insulated the accident would not have happened, and that with proper care defective insulation could have been avoided.¹

In a later case in the appellate division of the supreme court of New York,² the maxim was applied in a case in which a horse was killed by electric shock on stepping upon the rail of an electric railway. Willard Bartlett, J., referred to the leading cases and said: The fact that the electricity employed by the defendant as a motive power "was capable of escaping in such a way as to produce the casualty which actually took place was sufficient to justify the inference that the accident was due to the agency of the defendant, in the absence of proof that it was otherwise caused. . . . The doctrine of *res ipsa loquitur* simply calls upon the defendant, after proof of the accident, to give such evidence as will exonerate him, if any there be, and relieves the plaintiff from the burden of proving the non-existence of adequate explanation or excuse."

The same conclusion was reached in a similar case in New Jersey.³ The court said: "It must be assumed that with proper and sufficient bonds the rails would have carried a current of electricity with safety to horses stepping upon them. Otherwise the operation of the railway in a public street by means of electricity passing through its rails was *ipso facto* a nuisance. . . . If, therefore, electricity did escape from the rails, that fact was presumptive proof of negligence."

§ 273. The same — Cases.— In a case in the court of errors and appeals in New Jersey,⁴ the "thing itself" was the only evidence. The facts proved showed that the death of a man was due to electric shock. The dead body of a policeman was found at the foot of an electric-light pole, upon which, at about the level of a man's head, was found a reel of uninsulated wire rope heavily charged with electricity, and there was a fresh burn upon the man's hand, and his blood was

¹ See also *Clements v. Louisiana* 109 U. S. 120, 34 App. EL. LT. CO., 44 LA. ANN. 692, 4 AM. DIV. 14, 54 N. Y. SUPP. 96 (1898).
² *EL. CAS.* 381, 11 S. REP. 51.

³ *Trenton Pass. Ry. Co. v. Cooper*, Same v. Bennett, 60 N. J. LAW, 219, 37 ATL. R. 730 (1897).

⁴ *Suburban Electric Co. v. Nugent*, 58 N. J. LAW, 658, 34 ATL. REP. 1069, 267, 41 N. Y. SUPP. 321 (1897); *O'Fla-* 6 AM. EL. CAS. 238 (1896).

found to be in the condition usual with those who have died of electric shock. The court said: "These facts unexplained not only make it reasonable to suppose that the decedent came to his death through having touched with his hand the uninsulated wire which was fastened to the defendant's electric-light pole, and thereby received a fatal shock, but exclude any other inference."

In still another case in New Jersey¹ relating to the fall of an electric lamp suspended over a street, the supreme court said: "The general rule is that the occurrence of an accident does not raise the presumption of negligence; but when the testimony which proves the occurrence by which the plaintiff was injured discloses circumstances from which the defendant's negligence is a reasonable inference, a case is presented which calls for a defense;" and after referring to the cases above cited in section 232, the court said: "It would seem within the principle upon which the cases were decided that the fall of a lamp of the weight of the lamp in question (twenty-six pounds), suspended over a public street, without any explanatory evidence, would raise a presumption of negligence *res ipsa loquitur* sufficient to put the defendant on the defense."

In a later case in the New Jersey supreme court² the question was whether the fact that the broken electric-light wire was seen on the sidewalk shortly before it was picked up by a little child was sufficient *prima facie* proof of negligence. It was insisted that there might not have been time enough to remove it, and that the fall might have been caused by the elements, or something beyond the defendant's control. The court said they could not agree that the plaintiff was bound to eliminate every such cause. They referred to the New Jersey cases above cited, and the opinion of Judge Bartlett in the case in New York, and the language of Baron Channell in an English case,³ and held that it was for the defendant to exonerate itself on proof being made that the wire had fallen and caused the injury.

¹Excelsior Electric Co. v. Sweet, 62 N. J. Law, 505, 41 Atl. Rep. 712 57 N. J. Law, 224, 30 Atl. Rep. 553 (1898).

³Bridges v. North London Ry. Co.,

²Newark EL Lt. & P. Co. v. Ruddy, L. R. 6 Q. B. 377, 391.

So, also, in Illinois¹ it was held that, where an electric street railway company permits a broken wire to hang loose in the street, proof of an injury by reason of it makes a *prima facie* case of negligence. In a case in West Virginia,² where an electric wire fell from its support and killed a man in the street, the court discussed at some length the application of the maxim *res ipsa loquitur* to cases of this kind, and decided that the fall of a wire charged with a deadly current and suspended over a public street, is *prima facie* evidence of negligence, subject to be rebutted by proof that the fall was not due to want of care.

On the other hand, the supreme court of Pennsylvania³ distinguished the case of one injured indirectly by the falling of a wire and those cases in which there is a relation of contract requiring the use of proper appliances; and it was held that where the plaintiff was injured because of the frightening of his horse by the fall of a live wire in the street, the proof of the fall of the wire was not sufficient *prima facie* evidence of negligence.⁴

§ 274. Liability of municipalities for defective poles and wires in the streets.—How far cities and towns are liable for injuries caused by the defective or dangerous condition of poles and wires allowed to be maintained in the streets is a question of some interest and importance. There is a good deal of difference of opinion on the question whether public corporations are liable to individuals for any injury arising out of the neglect of a public duty.

With regard to the inhabitants of a district it was declared in England in *Russell v. Men of Devon*⁵ that no private action

¹ *Larson v. Central Ry. Co.*, 56 Ill. App. 263.

² *Snyder v. Wheeling Electric Co.*, 43 W. Va. 661, 28 S. E. R. 733, 39 L. R. A. 499 (1897), with note and briefs.

³ *Kepner v. Harrisburg Traction Co.*, 183 Pa. St. 24, 38 Atl. Rep. 416 (1897).

⁴ The court distinguished *Shafer v. Lacock*, 168 Pa. St. 497, 32 Atl. Rep. 44, 29 L. R. A. 254. For other cases on the presumption of negligence and

the maxim *res ipsa loquitur* applied to accidents from electric wires, see *Western Union Teleg. Co. v. State* to the Use of Nelson, 82 Md. 293, 6 Am. El. Cas. 210 (1896); *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. Rep. 344, 5 Am. El. Cas. 264 (1894); *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 502, 47 Am. Rep. 75; *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. Rep. 269, 4 Am. El. Cas. 332 (1893).

⁵ 2 Term Rep. 667.

can be maintained against them for a breach of a corporate duty to the public unless the right of action is given by statute. This doctrine has been applied in some of our states to incorporated towns as well as to townships and counties. In New Jersey, for example, it was applied in 1840 to the chosen freeholders of a county with respect to the neglect to maintain a bridge,¹ and in 1868 to a city failing to remove an obstruction from a public street, and the rule was declared to be well settled that no action would lie for injury to an individual against a public corporation for the neglect of a public duty.² In Massachusetts also the rule was applied to incorporated towns, and it was early declared that in the absence of statute no such action would lie against them for an injury arising from a defect in the highway. The same rule was adopted in the New England states generally and in Michigan and California; but in New England especially, statutes have been passed making cities and towns strictly answerable to individuals for defects in the highways.³ In most of the other states, however, cities and towns are held liable for damages caused by failure to keep their streets in safe condition for travel whether such a remedy is given by the statute or not.⁴

§ 275. The same — Continued.—In those jurisdictions where no action can be maintained by an individual against a municipality for the defective condition of its streets, cities cannot be held liable in tort for injuries caused by electric wires in the streets. The only remedy against a city in such a case for maintaining or permitting a dangerous obstruction in the street is by indictment.⁵ But wherever, by statute or at common

¹ *Livermore v. Freeholders of Camden*, 29 N. J. Law, 245.

² *Pray v. Jersey City*, 32 N. J. Law, 394.

³ *Mower v. Leicester*, 9 Mass. 247, 250; *Hill v. Boston*, 122 Mass. 344; *Woodcock v. Calais*, 66 Me. 234; *Seele v. Deering*, 79 Me. 343; *Jones v. New Haven*, 34 Conn. 1; *Hewison v. New Haven*, 37 Conn. 475; *Detroit v. Blackeby*, 21 Mich. 84; *Detroit v. Osborne*, 135 U. S. 495; *Chope v. Eureka*, 78 Cal. 588. For a leading English case see *Mersey Docks v. Gibbs*, L. R. 1 Eng. & Ir. App. 93.

⁴ *Ray, Negl. of Imposed Duties*, 342, and cases cited; *Carrington v. St. Louis*, 89 Mo. 208; *Mulcairns v. Janesville*, 67 Wis. 24; *Welter v. St. Paul*, 40 Minn. 460; *Denver v. Rhodes*, 9 Colo. 554; *Bennett v. Whitney*, 94 N. Y. 302; *Sterling v. Thomas*, 60 Ill. 264; *Parker v. Mason*, 39 Ga. 725; *Barnes v. Dist. of Columbia*, 91 U. S. 540-547; *Cleveland v. King*, 132 U. S. 295.

⁵ *Pray v. Jersey City*, 32 N. J. Law, 394.

law, cities are held responsible to individuals for defects in the highways, there may well be circumstances under which they are chargeable with the defects caused in the first instance by the negligence of private companies lawfully maintaining lines of electric wires in the streets. They may be chargeable with negligence in failing to remove the danger or obstruction after notice, and they may even be liable for permitting such defects dangerous to travelers to exist in the highway.

In Massachusetts, for example, where the liability depends entirely upon the statute,¹ cities have been held liable to persons injured by coming in contact with live wires dangling in the street, and the only question has been whether they were travelers at the time or were using the streets only for play;² but in cases to which the statute did not apply it has been held that there is no liability at common law, and that a city is not liable to a lineman employed on its fire-alarm system for injuries due to the breaking of a pole negligently maintained.³

It was held in Maine that an individual has a right of action against a city for an injury caused by the obstruction of the street by a street railway post improperly located, and that an unsatisfied judgment against the street railway company for the same injury is no bar to the action.⁴ The liability of the company for negligence respecting the location of the post existed, the court said, at common law, "while the liability of the city for permitting the obstruction to remain is created by general statute. (R. S., c. 18, c. 378.) And although the liability of both is reaffirmed in section 8, chapter 378, of the laws of 1885, for obvious reasons they cannot be deemed joint tort-feasors with respect to the mode of redress."

In Colorado the United States circuit court of appeals declared that a city, by authorizing an electric-light company to erect poles and wires in the streets, does not become chargeable with the duty of inspecting them and maintaining them in a safe condition for the protection of travelers to the same

¹ Mass. Pub. Stat., ch. 52, § 1; Hill v. Boston, 122 Mass. 344.

² Graham v. Boston, 156 Mass. 75, 4 Am. El. Cas. 372, 30 N. E. Rep. 170; Bourget v. Cambridge, 156 Mass. 391, 4 Am. El. Cas. 374, 31 N. E. Rep. 390.

³ Pettingill v. Chelsea, 161 Mass. 368, 37 N. E. Rep. 380, 5 Am. El. Cas. 358.

⁴ Cleveland v. Bangor, 87 Me. 259, 32 Atl. Rep. 892, 5 Am. El. Cas. 346.

extent as if it had erected them itself, but that its duty extends only to a general supervision over the light company, and that it is liable only when it has been negligent after notice of defects that may be dangerous.¹

When a city itself puts up and maintains electric wires, it has been held in New York that it is liable in tort for the death of a person killed by touching a wire negligently allowed to fall down and come and remain in contact with a trolley wire, and that the fact that the wire was put up and used by the police department for public purposes does not relieve it from responsibility for injuries to individuals.²

¹City of Denver v. Sherret, 88 Fed. Rep. 226, 60 U. S. App. 104 (1898).

²Twist v. Rochester, 37 App. Div. 307, 55 N. Y. Supp. 850 (1899).

CHAPTER XVI.

ELECTRIC LINES AS PROPERTY.

§ 276. **Introductory.**—There are several classes of cases in which lines of electric wires in the streets are considered as property. In some it is important to determine whether they are real or personal property; in others whether they come within the meaning of statutes relating to mechanics' liens, and in others whether they are embraced in the general descriptive language of contracts, mortgages or conveyances; and in others again the question arises whether the privilege of maintaining the lines in the public streets is a right of property and an interest in land, or whether and to what extent lines of electric wire are subject to taxation either as real or as personal property.

§ 277. **Electric lines as fixtures.**—The answer to the question whether lines of wires attached to posts or laid in tubes underground are real or personal property depends on the purpose for which the question is asked, and on the relations and agreements of the parties, as well as on the character of the lines themselves. The lines are fixtures, and whether they are to be treated as real or personal property, under given circumstances, depends on the principles commonly applied to fixtures and need not be discussed here. When the question is asked for the purposes of taxation, the answer may depend somewhat on the character of the classification of property under the tax law, and it may be modified by the fact that the land to which the lines are affixed may belong to the public or to others than the owner of the lines. Cases on taxation will be referred to later. The lines are in a certain sense fixtures; they are attached to posts set in the ground or laid in tubes under the surface. The electric-light and the electric-railway lines are connected with a central building with machinery, where the power is generated; and the same is true, in a sense, of the telephone and even the telegraph. The lines in all cases form a connected whole and the structure is permanent in its char-

acter; but the several wires at least are capable of removal or renewal as the needs of business may require. Where such lines are attached to land belonging to their owner, as in the case of a telegraph along the right of way of a railroad company, they are plainly such fixtures as would pass with a conveyance or mortgage of the land; but in most cases the lines are stretched along public highways and the land belongs to others, and the owner of the line may have a mere license, or he may occupy the land by virtue of a public franchise and as a part of the highway. In such cases the lines may be treated as personal property for the purpose of keeping the ownership distinct from that of the land, or, if they are regarded as fixtures, it may be as fixtures connected with the land and building where the electricity is generated. On the other hand, if a right of way over private property be obtained by agreement or condemnation, an easement is created which is an interest in land, and the posts and wires are fixtures connected with the real estate. The same is true of a line of telegraph in a public street when such a line is regarded as a new burden upon the land,¹ and it may be interesting to speculate on the question whether the character of the lines as real or personal is affected by the answer to the question whether or not the electric line constitutes a new burden, or is a proper use of a public street, affecting no rights of the owner of the land.

§ 278. Same—Cases.—A few cases may be referred to relating directly to electric lines as fixtures or real or personal property.²

In an English case in 1860, where the question was whether the telegraph line should be deducted from the value of a railway in making an assessment for taxation, the law was that a deduction should be made for "interest on capital and tenants' profits," and Blackburn, J., said the question was "what machinery would pass with the line if it were let?" and it was held that deduction should be made for office and station furniture, but not for the telegraph line. This was described as consisting of posts driven into the ground and of wires passed through sockets annexed to the posts, but which wires might be disconnected from the posts without injuring or displacing them.

¹ See chs. VIII-IX on Rights of Abutting Land-owners.

² Regina v. North Staffordshire Ry. Co., 3 El. & El. 392.

This was classed among the "things which, though capable of being removed, are yet so far attached as that it is intended that they shall remain permanently connected with the railway or premises used with it, and remain permanent appendages to it as essential to its working."

This decision was quoted in a case in Arizona in 1887. On a bill to quiet title it appeared that an electric-light company engaged in lighting a city owned a lot with a building and electric machinery and set up eighteen masts in the streets upon which the wires were strung which carried the current from the dynamos to the lamps. It was held that the wires formed an essential integral part of the machinery on the lot, and passed as fixtures under a mortgage on the lot together with all machinery and together with the tenements, hereditaments and appurtenances. The court said the right of way along the street was a mere license subject to the public use of the same and in no way affected the fee.¹

In a case in Texas in 1889, relating to a mechanics' lien, it was held that electric-light wires with the posts set up in the public streets were real estate connected with the lot and building where the electricity was generated.² Other cases to the same effect are referred to in the next section. But when the question is whether lines set up in a public street are taxable without reference to any interest in the land in which the posts are set, it has been held that telegraph lines as well as gas and water mains are personal property.³ And even where electric-light poles have been partly upon private property and partly in the streets under permission subject to revocation, it has been held that the poles and wires are not part of the realty or appurtenant thereto for the purposes of taxation.⁴ It has been held that telegraph poles set up in a highway are part of the freehold, and that an action of trespass for cutting them down is a local action and can be brought only in the state where they are situated.⁵ The wires being originally personal in their nature, and being

¹ *Fechet v. Drake*, 12 Pac. Rep. 694, ex rel. *Craddick*, 140 Ill. 545, 30 N. E. 2 Am. El. Cas. 331 (Arizona Sup. Ct., Rep. 678, 4 Am. El. Cas. 559 (1892). 1887).

² *Keating Implement Co. v. Marshall El. Lt. Co.*, 74 Tex. 605, 12 S. W. Rep. 489 (1899).

⁴ *Newport Illum. Co. v. Tax Assessors*, 19 R. I. 632, 36 Atl. Rep. 426 (1896).

⁵ *Am. Union Teleg. Co. v. Middleton*, 80 N. Y. 408 (1880).

³ *Shelbyville Water Co. v. People*

capable of being detached, may remain personalty by agreement of parties and subject to removal;¹ and so while new wires attached as a permanent improvement were held to pass under a mortgage of the property and lines of a telegraph company, it was also held that other wires put up under an agreement that they should not become a part of the realty were subject to be removed by the mortgagor. But where wires furnished by the company were put up with the intention of making them a permanent part of the line, and the man who put them up grounded one end to prevent them from being used, in view of the appointment of a receiver, it was held that they were nevertheless subject to a mortgage given by the receiver.² Other cases will be referred to in the following sections relating to mechanics' liens and to taxation.

§ 279. *Electric lines subject to mechanics' lien.*—The mechanics' lien laws of the different states are various, but it may be useful to refer to some decisions on the question whether poles and electric wires set up in the streets come within the terms of the statutes giving liens upon land and fixtures for labor and materials furnished in improvements.

It has been held in Oregon³ that poles and wires for the purpose of furnishing light and power constitute a "structure" within the statute of that state giving a lien for materials furnished in the construction of any building, machinery, . . . or any other structure. And in Kansas, that when an electric-light and power company, owning land and having machinery thereon for the production of electric light, purchased poles and set them up in the streets of a city and used them for the support of its wires, the poles were appurtenances of the building within the meaning of the mechanics' lien law, and the land and building and appurtenances were subject to the lien.⁴ On a motion for a rehearing it was held that the work of an electric-light company was not so distinctly public in its nature as to exempt its property from mechanics' liens.⁵

¹ *West. Union Teleg. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. Rep. 1; *Boston Safe Deposit & Trust Co. v. Bankers' & Merchants' Teleg. Co.*, 36 Fed. Rep. 238, 297.

² *Postal Teleg. Cable Co. v. Vane*, 80 Fed. Rep. 961.

³ *Id.*, 19 Oreg. 61, 23 Pac. Rep. 670, 3 Am. El. Cas. 527 (1890).

⁴ *Badger Lumber Co. v. Marion Water Supply, El. Lt. & P. Co.*, 48 Kan. 187, 29 Pac. Rep. 476, 4 El. Cas. 551.

⁵ *Id.*, 48 Kan. 187, 30 Pac. Rep. 117, 4 Am. El. Cas. 556.

⁶ *Forbes v. Willimantic Falls El.*

In a case in Texas,¹ above referred to, where a mechanics' lien was filed against a lot and building with electrical machinery, and the posts and wires of an electric-light company set up in the streets of a city, the master found that it was "impracticable to separate the poles, wires, lamps and other attachments from the lot and improvements thereon," and the court declared that they were fixtures and subject to the mechanics' lien.

So also in the court of chancery of New Jersey,² it was held that the poles and wires of an electric-light company are "fixtures for manufacturing purposes" within the meaning of the mechanics' lien statute, and that the plaintiff was entitled to a lien on the land and buildings of the power station. The vice-chancellor said the fact that the poles stood upon land which might belong to others, and that the wires extended into the dwellings of others, did not affect the right of lien upon the land and building of the defendant to which the lines were connected as fixtures.

It is to be observed that all these cases relate to electric-light lines, and that the lien is allowed upon the ground that they are fixtures connected with a piece of land with buildings and machinery upon which the lien is placed, and in one case it is on the ground that they constitute fixtures for manufacturing purposes. This last does not seem to apply to the telegraph or telephone.

§ 280. Electric lines as property subject to taxation — Real or personal property.—There is some difference of opinion as to whether electric wires in the streets, and the poles and subways, are real or personal property for the purpose of taxation. The question often depends upon the construction of the statute classifying the property upon which the taxes are imposed, but in the absence of words of definition in the statute it is sometimes necessary to determine whether the lines are to be classed as real or personal property. On the one hand it is argued that they are permanently connected with the land on which the electricity is generated, and are also attached to the land in the streets where the posts are set or the

¹Keating Implement Co. v. Marshall El. Lt. Co., 74 Tex. 605, 13 S. W. Rep. 489 (1889).

²Hughes v. Lambertville El. Lt. Co., 53 N. J. Eq. 435, 32 Atl. Rep. 69, 5 Am. El. Cas. 626 (1895).

tubes laid; and on the other hand it is insisted that the wires are not in the legal sense appurtenant to the land where the central station is located, but are merely attached to the machinery and capable of severance, and that the streets along which the wires are laid do not belong to the owner of the wires, and that the license to set poles there does not constitute an interest in land.

In England it has been held that a telegraph company is ratable as an "occupier of land" in respect of its poles and wires and the land to which they are fixed, even though the poles are subject to removal at any time by the railroad company on whose right of way they are placed.¹

In a case in Tennessee,² it was held that a telegraph line was subject to local taxation as property having a local *situs*, and should be regarded as real estate, after the analogy of railroads and their rolling-stock.

In a case in Illinois,³ lines of electric wire in the streets were likened to gas pipes and water mains, and the court referred to cases in which difference of opinion was found with regard to these. In some it was held that, in the absence of statute, they must be regarded as realty appurtenant to the land on which the works were placed.⁴ In others it was held that they are personal property;⁵ and in the case in Illinois the court said it was inclined to follow these latter decisions, and to hold that the wires as well as the water mains of the defendant were taxable as personal property, especially in view of the fact that the engines to which they were attached were declared by statute to be personal property.

To the same effect was the decision of the supreme court of Rhode Island.⁶ With regard to the poles and wires used to

¹ Electric Telegraph Co. v. Overseers of the Poor of Salford, 11 Exchequer. 181; Allen's Tel. Cas. 27; Lancashire Teleph. Co. v. Overseers of the Poor of Manchester, 53 Law Times Rep. 793.

² Western Union Teleg. Co. v. Tennessee, 9 Baxt. 509, 1 Am. El. Cas. 327 (1880).

³ Shelbyville Water Co. v. People ex rel. Craddock, 140 Ill. 545, 30 N. E. Rep. 678, 4 Am. El. Cas. 559.

⁴ Capital City Gas Light Co. v. Charter Oak Ins. Co., 51 Iowa, 31, 50 N. W. Rep. 579; Appeal of Des Moines Water Co., 48 Iowa, 324. See Chelsea Waterworks v. Bowley, 17 Q. B. 358.

⁵ People v. Board of Assessors, 39 N. Y. 81; Memphis Gas Light Co. v. State, 6 Cold. (Tenn.) 310.

⁶ Newport Illuminating Co. v. Tax Assessors, 19 R. I. 632, 36 Atl. Rep. 426, 6 Am. El. Cas. 659 (1896).

conduct electricity from a central station to buildings throughout the city, the court held that they were not fixtures to the land on which the central station was built,¹ and that they were not appurtenant to that land in the technical sense of the term, but were "simply articles of personal property belonging to the petitioner, situated in part in the streets of Newport and in part on private lands, and used for the time being" in connection with the land. Referring to the fact that the poles and wires were located in the streets and were intended to remain there indefinitely, the court said they could not ignore the fact that the permission of the city was subject to be revoked at any time and that the company had no vested interest, and they distinguished the cases in which telegraph lines and gas and water pipes had been taxed as real estate as cases in which the corporation had an easement in fee in the highways in which the lines were placed.²

§ 281. **The same — Value of the interest in land for taxation.**—In an opinion by Judge Peckham in the New York court of appeals³ there is a discussion of the value, for the purposes of taxation, of the interest of a telegraph company in the land in the streets along which its lines are strung. The statute declared that the portion of any telegraph, telephone or electric-light line in any town or ward should be assessed in the manner provided by law for the assessment of lands of resident owners, and that the word "lines" should include the interest in the land on which the poles stood, and the right or license to erect the poles. The court said that calling the poles, wires and insulators land did not change their character as manufactured articles capable of reproduction, and that the right to erect poles was not an exclusive right, and was a mere license, subject, under the police power of the state, to

¹Citing *Providence Gas Co. v. Thurber*, 2 R. I. 15. In *People v. Board of Assessors of Brooklyn*, 39 N. Y. 81 (1863), it was held that under a statute providing that the term "land" shall include all buildings and other articles erected upon or affixed to the same, gas mains running under the streets of the city are not to be regarded as real estate in the taxation of the land of a gas company.

²See also the cases cited in the following section. As to whether the city has power to revoke the permission, see §§ 42-45, *supra*. As to estate of a street railway having a vested right to its franchise, see *People v. O'Brien*, 111 N. Y. 1; *Milbau v. Sharp*, 27 N. Y. 611.

³*People ex rel. etc. v. Dolan*, 126 N. Y. 166, 27 N. E. Rep. 269, 6 Am. El. Cas. 40 (1891).

revocation at any time;¹ and therefore, in estimating the value of the property as such for the purposes of taxation, the true criterion was the cost of the production of the poles and wires as erected, including what was paid to individuals for the use of their lands. An assessment was declared to be erroneous which estimated the value of the property within the district by reference to the value of the whole line. The business and franchises of the company were taxed under another statute, and the court said they could not be considered under the statute imposing a tax upon the property as such. The court distinguished between the interest of a telegraph company and that of a railroad company in the land.²

§ 282. Franchise tax and taxation of the franchise.—In this case the question was merely as to the value of the interest in the land. This is an important element of the franchise of a telegraph company, but not the whole of it. There are many cases relating to the taxation of the franchises of telegraph companies and other companies occupying the streets with electric wires, and it is important to distinguish clearly between a tax upon the franchise as property and a franchise tax imposed as a condition of the exercise of the franchise. The franchise to operate a telegraph company, for example, and occupy the streets for that purpose, has value in itself; it is one of the possessions of the company, and is included in the value of the whole property, but apart from this it is a privilege granted by the state for which the state can exact a payment. In this respect it is like the corporate franchise or the privilege to exist as a corporation. Such an exaction is not strictly a tax; it is like the excise or a license fee imposed upon a privileged business or occupation,³ and it is a part of the power to impose conditions on the granting or continuing a privilege. A franchise

¹ Citing *Am. Rapid Teleg. Co. v. Hess*, 125 N. Y. 641, 26 N. E. Rep. 919, 3 Am. El. Cas. 142. See § 72, *supra*, and also §§ 42-45.

² By a later statute in New York (Laws of N. Y. 1896, ch. 908, § 2, subd. 3) it was declared that the terms "land" and "real property" should include "all supports and inclosures for electrical conductors and apparatus," and this statute has been held to apply

to the machinery for generating electricity, and to require that it be assessed as realty in the district where situated. *Herkimer Co. Light & Power Co. v. Johnson*, 37 App. Div. 257, 55 N. Y. Supp. 924 (1899).

³ See *Portland Bank v. Apthorp*, 12 Mass. 252; *Oliver v. Washington Mills*, 11 Allen, 268; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 227.

tax may be fixed with reference to the value of the property or business involved, but it is not measured by it directly or limited by it.¹ It is fixed by law with reference to an arbitrary standard of calculation—it may be by the nominal value of the capital stock of a corporation or the earnings of a business, the number of miles of wire of a telegraph line or the number of posts set up in the streets. Such a tax is not affected by the fact that the property itself is subjected to another tax, nor is it limited by the rule that requires uniformity in the taxation of property.²

§ 283. Franchise taxes on companies operating electric lines.—Franchise taxes to a small amount are commonly imposed upon corporations generally. These are strictly limited to the corporate franchise or privilege of being a corporation, but larger exactions are made of certain classes of companies which carry on a large business with comparatively little tangible property, and which exercise some sort of public function or possess some special privilege. Among these are telegraph, telephone and electric-light companies and street railways. This tax is imposed with some reference to the special privi-

¹The corporate franchise is distinct from the franchise to perform some public function or exercise some public right, as, for example, the right to take property or the public streets for a railroad or a telegraph line, and to take tolls for the use thereof. The former belongs to the corporators and is not alienable by the corporation; the latter is one of the privileges or powers of the corporation and may be alienable and may survive the dissolution of the corporation. *Memphis R. R. Co. v. Commissioners*, 112 U. S. 609, 619; *Morgan v. Louisiana*, 93 U. S. 217, 223; *New Orleans, etc. R. R. Co. v. Delamore*, 114 U. S. 506; *Hall v. Sullivan*, 2 Redf. Am. Ry. Cas. 621; *So. Pacific Ry. Co. v. Orton*, 33 Fed. Rep. 457, 475; *Middlebury Bank v. Edgerton*, 30 Vt. 182, 190; *People v. O'Brien*, 111 N. Y. 1, 18 N. E. Rep. 692; *People v. Neff*, 15 App. Div. 585, 44 N. Y. Supp. 810, quoted below, § 287; *Pierce v. Emery*, 32 N. H. 507.

²With regard to the nature of a franchise tax and the distinction between this and a tax on property, see *Society for Savings v. Coite*, 6 Wall. 594; *Provident Inst. v. Massachusetts*, 6 Wall. 611; *Minot v. Philadelphia, W. & B. R. R. Co. (the Delaware Railroad Tax Case)*, 18 Wall. 206, 231; *California v. Pacific Ry. Co.*, 127 U. S. 1, 41, per Bradley, J.; *People v. Home Ins. Co.*, 92 N. Y. 328; *The Same v. The Same*, 154 U. S. 594; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217; *Lumberville Delaware Bridge Co. v. Assessors*, 55 N. J. L. 529; *Standard Underground Cable Co. v. Attorney-General*, 48 N. J. Eq. 270; *Jersey City Gaslight Co. v. United Gas Imp. Co.*, 46 Fed. Rep. 264; *Cooley on Taxation*, 176; 25 Am. & Eng. Ency. of Law, 632, 637 (1st ed.); 14 Am. & Eng. Ency. of Law, 8, 9 (2d ed.), and cases cited. Consult also an article by Prof. Edwin A. R. Seligman, 5 *Polit. Science Quarterly*, 442.

leges which the companies enjoy, but in some cases no distinction is made between the corporate franchise and the special franchise enjoyed by the corporation, and in others it is based expressly upon the extent and value of the special franchise; but even in these cases it is not necessarily a tax on property, but like the tax on the corporate franchise it may be a mere franchise tax, and as such it is an arbitrary exaction, a payment required as the price of the franchise, and limited only by the discretion of the legislature granting the privilege.

There is no doubt of the power of the legislatures of the several states to impose conditions of this nature upon the franchises granted by them to construct and maintain lines of electric wires in the highways, and the payment may be required in the form of license fees for the use of the streets or an annual payment for the franchise of the corporation, and this may be measured by the earnings of the business or the amount of the nominal capital or in other ways.¹

§ 284. **Character and scope of the franchise tax.**—The power of the state to impose a charge of this character upon a franchise of its own granting is undoubted, and it may be made practically equivalent to the usual tax on the franchise as property, or indeed on the whole of the property of the company both tangible and intangible. Practically, however, these franchise taxes are charges made by the state in the nature of an excise, and are additional to the tax levied on persons and corporations generally with respect to their property.

The franchise tax as such, moreover, can be levied only on the franchise granted by the state, and cannot be imposed with respect to any privilege granted or protected by the laws of the United States, as, for example, the carrying on of interstate commerce or the use of the post-roads for telegraph lines. For these and other reasons it is important to determine whether the franchises of a corporation, either its corporate franchise or the privileges which have been granted to it, and the rights of any kind and from every source which it enjoys, may be treated as property and assessed on the basis of their value in the market, to be ascertained as well as may be.

¹ *Minot v. Philadelphia, W. & B. R. Railroad Tax Cases*, 92 U. S. 575; *R. Co. (Delaware Railroad Tax Case)*, *Maine v. Grand Trunk Ry. Co.*, 142 18 Wall. 203; *Taylor v. Secor (State U. S. 217.*

§ 285. **Tax on the franchise as property.**—There is no doubt that the franchise of a corporation as distinguished from its corporate franchise does constitute a part of the property of the corporation.¹ Although it may have been granted in the same charter it is not inseparable from the corporate franchise. It may be sold or mortgaged or taken under execution; it survives the dissolution of the corporation and goes to creditors or stockholders;² and it cannot be taken for public use without compensation.³ Even though it has been granted subject to revocation by the state and municipality, there is a probability of indefinite continuance, and as a matter of fact such a franchise has a value in itself and increases the value of the property with which it is connected.⁴ It is, in short, a right belonging to the company itself, incorporeal property, an asset of the company with value that can be measured in money. This franchise, therefore, is plainly subject to taxation, and may be assessed for taxation if the law provides for the assessment of property of that character. There are many decisions to this effect, and the question has been not so much over the power to tax as whether the law provided for the taxing of this kind of property, and whether in certain cases the tax affected privileges secured by the laws of the United States.

§ 286. **Is the corporate franchise subject to tax as property?**—Whether the franchise itself is subject to tax as property is open to question. Justice Field in an opinion of the supreme court said: "The right or privilege to be a corporation or to do business as such body is one generally deemed of value to the corporators or it would not be sought in such

¹ Dartmouth College v. Woodward, 4 Wheat. 518, 700; Prov. Savings Inst. v. Massachusetts, 6 Wall. 611; Veazie Bank v. Fenno, 8 Wall. 533, 547; Taylor v. Secor (State Railroad Tax Cases), 92 U. S. 575; Home Ins. Co. v. New York, 134 U. S. 594; State Board of Assessors v. Central R. R. Co. of N. J., 48 N. J. Law, 146, 283, 288; Conover v. Taylor's Ex'r, 1 Black (U. S.), 603, 632; 3 Kent. Com. 459; Cooley on Taxation, 379 (2d ed.).

² People v. O'Brien, 111 N. Y. 1, 18

N. E. Rep. 692; New Orleans. etc. R. Co. v. Delamore, 114 U. S. 501.

³ People v. O'Brien, *ubi supra*; Suburban Rapid Transit Co. v. New York, 128 N. Y. 510, 28 N. E. Rep. 525; West River Bridge Co. v. Dix, 6 How. (U. S.) 507.

⁴ Portland Bank v. Apthorp, 13 Mass. 212; Attorney-General v. Bay State Mining Co., 99 Mass. 148; Gleason v. McKay, 134 Mass. 422; Central Pacific R. R. Co. v. California, 162 U. S. 91; Henderson Bridge Co. v. Kentucky, 166 U. S. 150.

numbers as at present;" and in another case he said: "According to the law of most states this franchise or privilege of being a corporation is deemed personal property and is subject to separate taxation.¹ The right of the states to thus tax it has been recognized in instances without number;" but it is to be observed that the judge speaks of the franchise as the property of the incorporators, and it was so regarded by the supreme court in an earlier case,² and has frequently been distinguished by this fact from the franchises of the corporation; and it is evident from the opinion of Mr. Justice Field that he is speaking only of the power of the state to impose a tax upon the franchise, and not considering the question whether it is an excise or a property tax. The fact that the value or the supposed value of the corporate franchise is included in the standard of calculation of the tax on a corporation does not make it necessarily a tax on property; it may none the less be a franchise tax. The distinction is made in many of the states between ordinary corporations which are required to pay a pure franchise tax measured by the nominal capital, and corporations which have the right to own and operate a railroad; for example, these are taxed upon the value of this franchise as property at its true value. This distinction is pointed out by Judge Garrison in a case in New Jersey referring to the language of Judge Field as noted above.³ But in another case in the same court the distinction was ignored; and where the question suggested was whether the corporate franchises of a water company were taxable under the statute providing for the assessment of real and personal property, a decision in the negative was put upon the ground that they did not come within the language and policy of the statute. The franchises in this case were in reality the valuable privileges of laying water pipes in the streets and supplying water for pay.

§ 287. Are the franchises included in the ordinary tax laws?—Assuming that a state has power to tax franchises as property, the question remains whether the franchises are included in the description of the property which the law directs

¹ Home Ins. Co. v. New York, 134 U. S. 594, 599; Horn Silver Mining Co. v. New York, 143 U. S. 305, 313.

² Memphis R. R. Co. v. Commissioners, 112 U. S. 609, 619.

³ Lumberville Delaware Bridge Co. v. Assessors, 55 N. J. L. 529.

to be taxed. Do they come within the scope of the statutes providing for the taxation of property as such, and especially are they included in the property ratable by local assessors under the ordinary tax laws? This question must, of course, be determined by the language of the statutes and the policy of the state. It may be useful to refer to some recent decisions on that question.

It has been decided by the court of appeals of New York that under an act providing for a tax upon corporations or their capital stock, a trust company could be assessed only for its existing tangible capital and surplus, exclusive of its dividend-earning power, its franchises or the good-will of its business.¹ The franchises of this company were merely to exist as a corporation and to carry on business, and it had already been declared that under the laws of New York the franchise of a street railway company to occupy the streets was a vested interest and valuable property, subject to alienation and succession;² but in the case of the Manhattan Railway Company the court of appeals held that the franchise of that company to operate an elevated railroad in the streets of New York city could not be included in the valuation of the capital stock of a street railway for the purposes of local taxation. The court said: "It is the actual value of its capital stock and not the market value of its share stock that is to be assessed; in other words, it is its actual, tangible, personal property and not its franchises. Other statutes provide for taxing of its real estate and franchises." The assessment was held to be erroneous because it included the franchises. This was followed by the same court in a later case relating to the same company,³ and by the appellate division of the supreme court in cases relating to electric railway⁴ and electric-light companies.⁵

In the second of these cases⁶ the court, citing the case of the

¹ *People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 27 N. E. Rep. 818.

² *People v. O'Brien*, 111 N. Y. 1, per Ruger, C. J., p. 41; *Milhau v. Sharp*, 27 N. Y. 611.

³ *People ex rel. Manhattan Ry. Co. v. Barker*, 152 N. Y. 418, 46 N. E. Rep. 875-882 (1897).

⁴ *People ex rel. Coney Island & B. R. R. Co. v. Neff*, 15 App. Div. 585, 44

N. Y. Supp. 810 (1897); *People ex rel. Brooklyn City R. R. Co. v. Assessors of Brooklyn*, 19 App. Div. 590, 46 N. Y. Supp. 385 (1897).

⁵ *People ex rel. Edison El. Ill. Co. v. Assessors of Brooklyn*, 19 App. Div. 599, 46 N. Y. Supp. 388 (1897).

⁶ *People ex rel. Delaware, L. & W. R. R. Co. v. Clapp*, 152 N. Y. 490, 46 N. E. Rep. 842.

Manhattan Railway Company, and another case in the court of appeals relating to the taxation of railroads, said: "Again the law has been declared that franchises of a railroad cannot be assessed for taxation. This of course has ended all our speculations and suggestions. It is therefore now settled law that corporations have two classes of property — one subject to local taxation and the other wholly exempt from it, for the taxation under chapter 361, laws of 1881, is by express terms solely for state purposes."¹ The court suggested that it was within the power of the legislature to subject this kind of property to taxation, and a statute has since been passed in New York providing expressly for the assessment of the value of street railway, telegraph and similar franchises for the purposes of local taxation.²

§ 288. The same — Continued.— In a case in New Jersey³ relating to a water company whose franchise included the right to lay pipes in the streets and supply water for pay, the court said: "The question presented in this case is whether our general laws authorize municipalities to levy taxes on mere corporate franchises. That such franchises are taxable as property is settled by the judgment in *State Board of Assessors v. Central Railroad Co.*,⁴ but whether they are included among the subjects of municipal taxation is another question dependent upon the proper construction of the laws delegating the taxing power to municipal bodies." The act of 1866 (Rev., 1150) declared that all real and personal property, whether owned by individuals or corporations, should be liable to taxation, and it was held that this form of expression and another clause enumerating various classes of property indicated that it was intended to include only such property as is usually owned by individuals and corporations alike, and to exclude offices of individuals and franchises of corporations. It was urged that franchises could be taxed under the act concerning corporations (Rev., p. 196; Sup. Rev., p. 170), which provided that the real and personal estate of every corporation should be taxed the same as

¹ Where by statute in 1866 the franchises of savings banks were declared to be personal property, taxable in the town or ward, such a tax was held valid although the funds of the bank were invested in United States

bonds. *Monroe Savings Bank v. Rochester*, 37 N. Y. 365 (1867).

² Laws of New York, 1899, ch. 712.

³ *Passaic Water Co. v. Paterson*, 56 N. J. L. 471, 29 Atl. Rep. 185 (1894).

⁴ 48 N. J. L. 146, 4 Atl. Rep. 578 (1886).

that of an individual; but the court said that the language of this act corresponded so closely with that of the former act as to compel the conclusion that the same subjects were intended by each.

In California, on the other hand, it has been held that the franchises of a water company are subject to taxation as property by the local assessor. The court held that they were property and were assessable under the constitution and under the statute providing for the assessment of property, and that the assessment might be made by the ordinary local assessor.¹ The opinion refers to many cases.

It was held in Michigan that telephone companies were exempt from local taxation under a statute which provided for a state tax in lieu of all local taxes.²

The decisions against the right of local taxation do not imply that special franchises are not taxable as property. They only declare that they are not included within the meaning of the existing statutes providing for the local taxation of property. It has been repeatedly decided that the special franchises of railroad, telegraph, telephone and electric-light companies are subject to taxation either as property or as franchises or privileges, and the recent statutes providing distinctly for the taxation by the state of the special franchises of companies of this kind have been generally sustained.³

¹Spring Valley Water Co. v. Rep. 323; Standard Underground Cable Co. v. Attorney-General, 62 Cal. 69 (1892).

²Attorney-General v. Detroit, 113 Mich. 388, 71 N. W. Rep. 632 (1897).

³State Board of Assessors v. Central R. R. Co. of N. J., 48 N. J. Law, 146, 4 Atl. Rep. 578 (1893); Porter v. Rock Island & St. L. Ry. Co., 76 Ill. 561; Taylor v. Secor (State Railroad Tax Cases), 92 U. S. 575; Cooley on Taxation, 383; 25 Am. & Eng. Ency. of Law, 630. The New Jersey statute relating to telegraph and electric-light companies, however, does not impose a tax on those franchises as property, but a mere franchise tax or excise on the privilege. 3 Gen. Stat. N. J. 3336; Jersey City Gas Light Co. v. United Gas Imp. Co., 46 Fed. Rep. 264; Same v. Same, 56 Fed.

Rep. 323; Standard Underground Cable Co. v. Attorney-General, 46 N. J. Eq. 270, 19 Atl. Rep. 753; Singer Mfg. Co. v. Heppenheimer, 54 N. J. Law, 439, 58 N. J. Law, 633, 24 Atl. Rep. 446, 34 Atl. Rep. 1061; Honduras Com. Co. v. State Board of Assessors, 54 N. J. Law, 278, 23 Atl. Rep. 668. It is well settled in New Jersey on principles applicable elsewhere that the state tax on corporations of a percentage on their capital stock is not a tax on property, but an imposition by way of license for exercising the corporate franchise. Standard Underground Cable Co. v. Attorney-General, 46 N. J. Eq. 270, 19 Atl. Rep. 753; Marsden Co. v. State Board of Assessors, 61 N. J. Law, 461, 39 Atl. Rep. 638. In Massachusetts it

§ 289. State franchise taxes and the federal laws — Question stated.—The question of the right of the states to tax the franchises of telegraph and telephone companies is complicated by the fact that these companies are engaged in interstate commerce, and that the former enjoy the privilege conferred by the act of congress of using the post-roads of the United States, and are, to a certain extent, agencies of the government.¹ The right of the states to authorize municipalities to exact license fees or rentals of such companies for the use of the streets was considered in an earlier chapter.² The question now is whether the states may impose a tax upon the franchise of the companies, either as an excise or franchise tax, or as a tax upon the value of the franchise as property, when the value of the franchise is derived in part from the fact that it is engaged in interstate commerce and is making use of the privilege granted by act of congress of using the post-roads of the United States.

§ 290. The same — Tax cannot be laid on interstate commerce.—It is well settled "that the telegraph is an instrument

has been held that they are taxable as property under the clause of the constitution that provides for the taxation of "commodities." *Portland Bank v. Apthorp*, 12 Mass. 252; *Attorney-General v. Bay State Mining Co.*, 99 Mass. 148; *Gleason v. McKay*, 134 Mass. 424; *Pub. Stat.* 1882, pp. 139, 140, 141. And under the present statutes the value of the franchise is estimated by the value of the shares after deducting the value of real estate and machinery, and it is taxed at the usual rates of tax on property. The effect of this is of course to include results of the good management of the business in the franchise, and to impose on corporations a tax not imposed on individuals carrying on a similar business. *Pub. Stat. Mass.*, ch. XIII, §§ 39, 40. In Massachusetts the franchises of all companies authorized to take toll are subject to attachment on mesne process. *Pub. Stat.*, ch. XV, § 39. Mr. Justice Bradley, in his dissenting opinion in *Maine v. Grand Trunk*

Ry. Co., 142 U. S. 217, 235, speaking of the various classes of taxes on corporations, says: "A corporation, according to this class of decisions, may be taxed several times over. It may be taxed for its charter, for its franchises, for the privilege of carrying on its business; it may be taxed on its capital, and it may be taxed on its property. Each of these taxations may be carried to the full amount of the property of the company. I do not know that jealousy of corporate institutions could be carried much further."

¹See ch. XII, § 175. That telephone companies are not entitled to these privileges was decided in *Richmond v. Southern Bell Teleph. Co.*, 174 U. S. 761. That telephone companies with lines between states are engaged in interstate commerce is obvious. It was decided in the case of the *Taxation of the Pennsylvania Telephone Co.*, 48 N. J. Eq. 91, 20 Atl. Rep. 846 (1891).

²Ch. IV, §§ 54, 55; ch. XII, §§ 188, 189.

of commerce, and that telegraph companies are subject to the regulating power of congress in respect to their foreign and interstate business, and that such a company occupies the same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods."¹ It is also settled that a state tax on government messages and on private messages sent out of or into the state is unconstitutional and void, but that a state tax on private messages wholly within the state is valid;² and also that a single tax levied on both classes of messages is not wholly void, but may be sustained as to that part of it which is levied on the business within the state, if it is capable of apportionment.³ It has been decided by the supreme court, and the decision has not been questioned,⁴ that the occupation or business of sending messages from one state to another cannot be taxed by a state, and that a state cannot impose a tax by way of license fee or otherwise on such business, because such a tax imposes a burden upon commerce.

§ 291. The same — Franchise of company engaged in interstate commerce may be taxed as property.—On the other hand it has been held that it is lawful for the states to impose a tax upon the property of a company engaged in interstate commerce according to its value, even though the value be owing in part to the fact that the property is used in the business of interstate commerce or the exercise of the privilege of using the post-roads of the United States. This principle was applied to telegraph companies in *Western Union Telegraph Co. v. Massachusetts* in 1887.⁵ The statute in that case imposed on the company a tax called a franchise tax based on the cash value of the capital stock after deducting so much as was proportionate to the length of the line outside of the state and allowing for tangible property locally taxed within the state. The corporation was organized under the laws of another state, and the company had accepted the provisions of the act of congress entitling it to the use of the post-roads.⁶ It was contended that

¹ *Pensacola Teleg. Co. v. Western Union Teleg. Co.*, 96 U. S. 1; *Ratterman v. Western Union Teleg. Co.*, 127 U. S. 411-425; *Western Union Teleg. Co. v. Texas*, 105 U. S. 460.

³ *Ratterman v. Western Union Teleg. Co.*, 127 U. S. 411.

⁴ *Leloup v. Mobile*, 127 U. S. 640.

⁵ 125 U. S. 530.

⁶ U. S. Rev. Stat., tit. 65, §§ 5263,

² *Western Union Teleg. Co. v. Texas*, 105 U. S. 460.

5268.

a tax based on the value of the stock was a tax upon the franchise, and that this being derived from the laws of the United States was not taxable by a state; but the court said the franchise to be a corporation was not derived from the act of congress, but from the laws of New York, and that the act conferring the privilege of using the post-roads was only a permissive statute and was not intended to exempt the companies from the ordinary burdens of state taxation, and the tax, although nominally upon the capital stock, was in effect a tax upon the company on account of property owned and used by it in Massachusetts. This decision was re-affirmed in a later case between the same parties,¹ and the same principle was applied to the taxation of railroads engaged in interstate commerce in two cases relating to the tax laws of Indiana.² Afterwards, where a privilege tax was levied on a telegraph company at so much per mile and in lieu of any other taxes, the supreme court held that while no tax may be levied by a state by way of duties on subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, yet a tax may be imposed upon a corporation on account of its property and may take the form of a tax for the privilege of exercising its franchises within the state, if the amount is made dependent on the value of the property, and if payment be not made a condition precedent to the right to carry on the business.³

The principle adopted in the Massachusetts cases was applied in a case arising under the statute of Indiana providing for a tax on telegraph companies.⁴ It was contended that under this statute the tax necessarily included the taxation of franchises granted by the United States, but the court said the statute could not be distinguished from that of Massachusetts, and it was held that the tax, measured by the value of the capital stock and apportioned according to mileage, was a tax

¹ 141 U. S. 40 (1891).

² Pittsburgh, etc. Ry. Co. v. Backus, 154 U. S. 421; Cleveland, etc. Ry. Co. v. Backus, 154 U. S. 439 (1894). See State v. Western Union Teleg. Co., 73 Me. 518, where the tax was held to be a tax on the business and not the property, and Western Union

Teleg. Co. v. Massachusetts was distinguished.

³ Postal Teleg. Co. v. Adams, 155 U. S. 688, affirming 71 Miss. 555, 14 S. Rep. 36.

⁴ Western Union Teleg. Co. v. Taggart, 163 U. S. 1 (1895).

upon property, and that the value of property was the proper basis of taxation, even though the value was caused by the fact that the property was used in interstate commerce, or in the exercise of the privilege of using the post-roads. The court, referring to the cases above cited, said: "Those decisions clearly establish that a statute of a state requiring a telegraph company to pay a tax upon its property within the state, valued at such a proportion of the whole value of its capital stock as the length of the lines within the state bears to the length of all the lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state, is constitutional and valid, notwithstanding that nothing is in terms directed to be deducted from the valuation, either for the value of the franchises from the United States or for the value of its real estate and machinery situated and taxed in other states, unless there is something more showing that the system of taxation adopted is oppressive and unconstitutional."

"It is enough for the state," said Mr. Justice Brewer in one of these cases relating to a railroad engaged in interstate commerce,¹ "that it finds within its borders certain value. What has caused that value is immaterial. It is protected by state laws, and the rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the state."

§ 292. The same — An excise tax may be levied on the franchise even though measured indirectly by receipts from interstate commerce. — In these cases the tax was justified on the ground that it was in fact a tax upon property, even though measured by the value of the stock, which depended indirectly on the use to which the property was put; and although that use consisted in part of commerce between the states. In another case relating to a railroad company,² the court sustained a state tax made directly upon the privilege of exercising its franchises in the state, even though the amount of the

¹ Cleveland, C., C. & St. L. Ry. Co. v. Backus, 154 U. S. 439. See also ² Maine v. Grand Trunk Ry. Co., 142 U. S. 217 (1891).
Western Union Teleg. Co. v. Norman,
77 Fed. Rep. 13 (1896).

tax was determined by reference to the average gross earnings of the company per mile within the state. The court said the privilege had value and the granting of it was entirely within the discretion of the state, and that the manner in which it is ascertained is of no consequence, because it may be imposed arbitrarily, as was decided in *Home Ins. Co. v. New York*,¹ and that therefore the tax was not a levy upon the receipts themselves and was not an interference with interstate commerce. Mr. Justice Bradley, with Harlan, Lamar and Brown, JJ., dissented, referring to the cases² in which it was held that no tax upon the business or gross receipts of interstate commerce can be imposed by a state, and said: "We think that the present decision is a departure from the line of these decisions. The tax, it is true, is called a 'tax on a franchise.' It is so called; but what is it in fact? It is a tax on the receipts of the company derived from international transportation."³

§ 293. The same — Taxation of franchises of express companies, bridge companies and telephone companies.— The principle that property employed in different states in interstate commerce may be valued as a unit and taxed in any state according to the ratio of the property found there, has been extended in more recent cases to the taxation of the franchises and intangible property of express companies.⁴ The statute under which this tax was levied applied to telegraph and telephone companies as well as express companies, and its validity was sustained.⁵ The same principle was also applied to the taxation by a state of the franchise of a bridge company maintaining a bridge between two states for the purposes of interstate commerce. A tax based on the capital stock after deducting the value of the tangible property in the other state was sustained as a valid tax on the intangible property in

¹ 134 U. S. 594.

² *Pickard v. Pullman's Palace Car Co.*, 117 U. S. 34; *Leloup v. Mobile*, 127 U. S. 640; *Norfolk & Western R. Co. v. Pennsylvania*, 136 U. S. 114; *Crutcher v. Kentucky*, 141 U. S. 47; *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326.

³ See a further quotation from this opinion in note 3. § 288, *supra*.

⁴ *Adams Express Co. v. Ohio State*

Auditor, 165 U. S. 194, 166 U. S. 185; *Adams Express Co. v. State of Indiana*, 165 U. S. 225; *Adams Express Co. v. Kentucky*, 166 U. S. 171 (1897).

⁵ *R. S. Ohio*, 2777-2780 (Nichols law); *Compiled Stat. Kentucky*, p. 1291, § 4077. See *Western Union Teleg. Co. v. Norman*, 77 Fed. Rep. 13, where the Kentucky statute is quoted.

Kentucky. It was said that the effect on interstate commerce was too remote to be considered, and that the declaration that such bridges should be regarded as post-roads did not interfere with the right of the state to impose such taxes.¹ In all these later cases strenuous opposition to this extension of the taxing power of the states was made by Justices White, Field, Harlan and Brown, and in this we may be sure they would have been joined by Mr. Justice Bradley, who in his life-time contended so earnestly against the encroachment of the taxing power of the states upon the federal control over interstate commerce.²

§ 294. **The same — Conclusions as to state taxes and interstate commerce.**—Referring to previous chapters³ for discussions of the cases on the power of states and cities to impose license fees on telegraph and telephone companies engaged in interstate commerce, and considering the decisions above referred to on the power to tax the franchises of such companies, the conclusions may be stated briefly as follows: A state, or a municipality by authority of a state, may impose a license fee on poles and wires for the purpose of the regulation of the use of the streets, or may exact a payment by way of rent or toll for the use of the streets. Neither cities nor states can impose any license fee or tax on the occupation or business of sending telegraph or telephone messages between the states, nor upon the messages themselves, nor directly upon the receipts of the business so far as they are derived from interstate commerce; but this exemption does not prevent the state from taxing the property of a person or corporation engaged in such business; and the franchise of a telegraph or telephone company may be taxed as property according to its value, although that value is in part derived from the fact that

¹ Henderson Bridge Co. v. Kentucky, 166 U. S. 150 (1897); Henderson Bridge Co. v. City of Henderson, 173 U. S. 592; s. c., 173 U. S. 624 (1899), affirming Henderson Bridge Co. v. Commonwealth, 31 S. W. Rep. 486. As to express companies and the Nichols law, see Western Union Teleg. Co. v. Poe, Auditor of Ohio, 61 Fed. Rep. 449; Adams Express Co. v. Poe, Auditor, 61 Fed. Rep. 470, 64 Fed. Rep. 9; Adams Express Co. v. Auditor

of Ohio, 155 U. S. 194; State v. Jones, 51 Ohio St. 492. As to a tax on an interstate bridge see Pittsburgh, C., C. & St. L. Ry. Co. v. West Virginia, 173 U. S. 32.

² With regard to the income tax on a telegraph cable company domiciled abroad and "carrying on business" in England, see Erichsen v. Last, 8 Q. B. Div. 414.

³ Ch. IV, §§ 54, 55; ch. XII, §§ 188, 189.

it is engaged in business between the states, and the franchise is also subject to an excise or privilege tax; and this is not invalid even though it be fixed with some reference to the gross earnings, which include the earnings of the business of interstate commerce.¹

§ 295. Franchise tax—Electric light, power and heat companies not exempt as manufacturing companies.—The statutes imposing a state tax on the franchises of corporations usually provide that manufacturing companies shall be exempt, either absolutely or on certain conditions. The question has arisen, therefore, whether companies engaged in generating electricity for light, heat or power are manufacturing companies within the meaning of these statutes. In Pennsylvania² the supreme court decided that an electric light and power company was not a manufacturing company within the meaning of the Pennsylvania statute of 1885, by which manufacturing companies were exempt from taxation, and the court rested its judgment not on the meaning of the word "manufacture," as given by lexicographers, but on the definition which the legislature had adopted and adhered to for more than half a century. This decision was approved in subsequent cases.³

The supreme court of Alabama,⁴ on the other hand, has decided that light companies are manufacturing companies, within the meaning of section 1565 of the code of 1886, which provided for the union or consolidation of mining, quarrying or manufacturing companies. The court regarded the production of electricity as analogous to the manufacture of artificial ice, citing *People v. Ice Co.*,⁵ and the manufacture of gas, citing *Nassau Gas Light Co. v. Brooklyn*.⁶

The court of appeals in New York decided in 1892⁷ that a

¹ For cases as to what statutes and rules of law referring to telegraph companies include telephone companies, see 25 Am. & Eng. Ency. of Law, 746. A statute providing for the mode of taxing telegraph property held to include telephone property. *Iowa Union Teleph. Co. v. Okaloosa*, 67 Iowa, 250, 1 Am. El. Cas. 799 (1885).

² *Commonwealth v. Northern Electric Light & Power Co.*, 145 Pa. St. 105, 22 Atl. Rep. 839.

³ *Commonwealth v. Edison El. Lt. Co.*, 145 Pa. St. 131, 22 Atl. Rep. 84; *Commonwealth v. Brush Electric Lt. Co.*, 145 Pa. St. 147, 22 Atl. Rep. 844.

⁴ *Beggs v. Edison Electric Light & Illuminating Co.*, 96 Ala. 295, 11 S. Rep. 331.

⁵ 99 N. Y. 181.

⁶ 89 N. Y. 409.

⁷ *People v. Wemple*, 125 N. Y. 543, 29 N. E. Rep. 808, 812.

corporation engaged in the business of generating and supplying electric currents for various purposes is a manufacturing company within the act of 1880 which exempted such corporations carrying on manufactures within this state from taxation. The court distinguished between the meaning of the word "manufacture" as given in the dictionaries, and the meaning of the word as used and considered in common language, and said that electricity as now used and applied to the business of life, being essentially the product of the skill and labor of man, there is no difficulty in reaching the conclusion that a corporation engaged in the business of generating, storing, transmitting and selling it is a manufacturing corporation within the meaning of the corporation tax law of New York (1880).

In a case in New Jersey in 1895,¹ it was held by Vice-Chancellor Bird that the wires and insulators used in connecting the electric-light plant with the dwellings and other places were "fixtures for manufacturing purposes," and as such came within the provisions of the mechanic's lien law; but the statute in New Jersey expressly taxes electric-light companies as such and not as manufacturing companies.

¹Hughes v. Lamberville Electric Light Co., 53 N. J. Eq. 435, 32 Atl. Rep. 69. See § 280.

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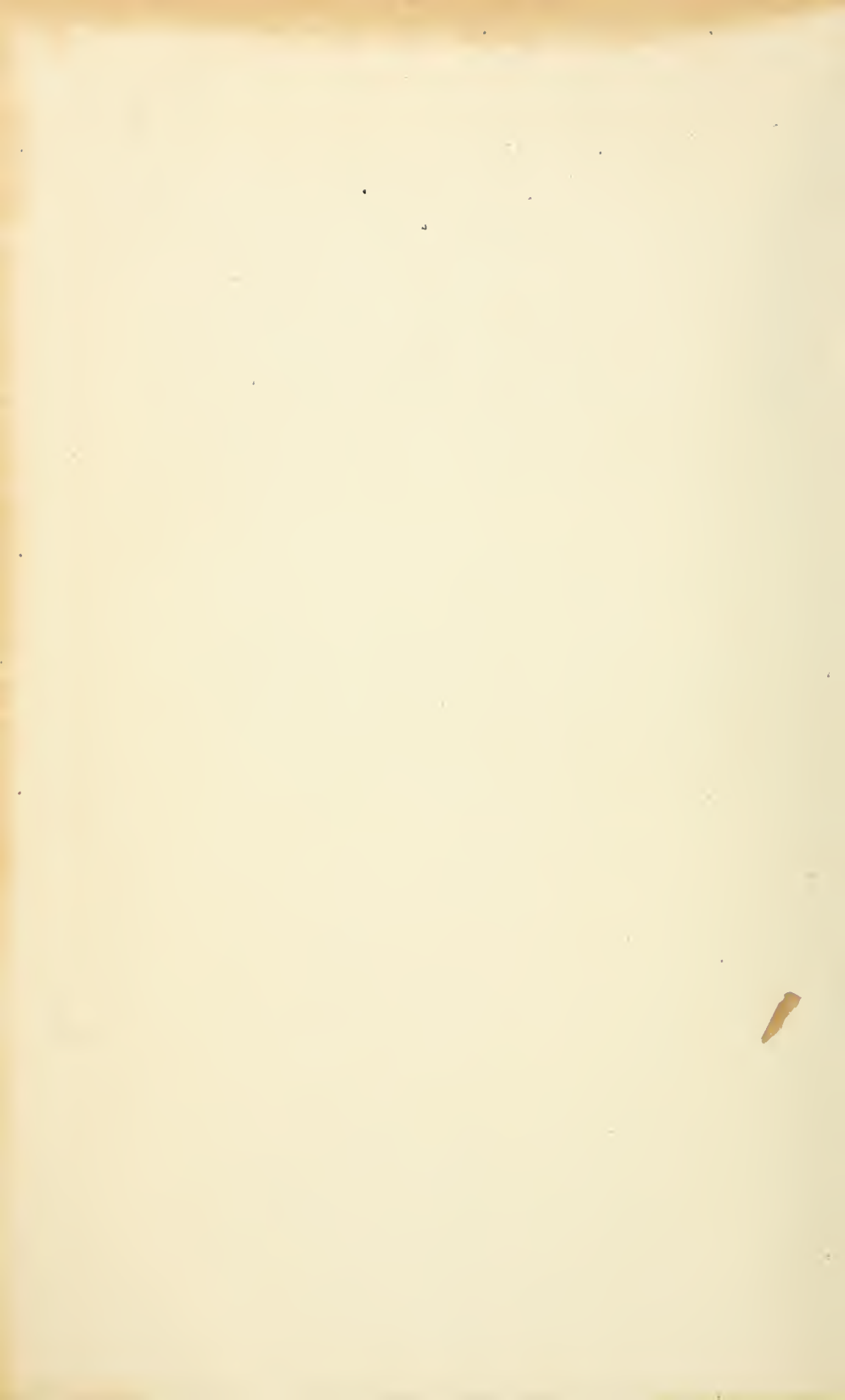
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